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02-6320

NO._____

Supreme Court, U.S.
FILED
JUL 29 2002
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN J. FELLERS,
Petitioner,

v.

OFFICIAL

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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SUPREME COURT, U.S.

JOHN J. FELLERS
PRO SE
REG. NO. 16253-047
FEDERAL CORRECTIONAL
INSTITUTION- PEKIN
P.O. BOX 5000
PEKIN, IL 61555-5000

QUESTIONS PRESENTED

I. Did the Court of Appeals err when they concluded that Petitioner's Sixth Amendment right to counsel under Massiah v. United States, 377 U.S. 201 (1964), was not violated because Petitioner was not "interrogated" by Government agents; when the proper standard under Supreme Court precedent, is whether the Government agents "deliberately elicited" information from Petitioner?

II. Should the second statements- preceded by Miranda warnings- have been suppressed as fruits of the illegal post-indictment interview without the presence of counsel, under this Court's decisions in Nix v. Williams, 467 U.S. 431 (1984), and Brown v. Illinois, 422 U.S. 590 (1975)?

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MOTION TO PROCEED IN FORMA PAUPERIS

The Petitioner, John J. Fellers, pro se, requests leave to file a Petition for Writ of Certiorari without pre-payment of costs and to proceed in forma pauperis pursuant to Supreme Court Rule 39. Petitioner has attached an affidavit in support of this motion to proceed in forma pauperis.

Dated this 29th day of July, 2002.

Respectfully submitted,

John J. Fellers
Reg. No. 16253-047
Federal Correctional
Institution- Pekin
P.O. Box 5000
Pekin, IL 61555-5000

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in this case, is found at United States v. Fellers, 285 F.3d 721 (8th Cir. 2002). The opinion is reproduced in Appendix "A". The opinion of the denial of rehearing is unpublished. The opinion is reproduced in Appendix "B".

The opinion of the United States District Court for the District of Nebraska, the Honorable Judge Lyle E. Strom is unpublished. The memorandum and order is reproduced in Appendix "C".

The opinion of the United States District Court for the District of Nebraska, the Honorable Magistrate Judge David L. Piester, is unpublished. The order is reproduced in Appendix "D". The Magistrate Judge read his conclusions and findings into the record at the suppression hearing. The transcripts of the suppression hearing are reproduced in Appendix "E".

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit affirming the district court's judgment was entered on April 8, 2002. A timely petition for rehearing was filed. The petition for rehearing was denied by the Eighth Circuit on May 7, 2002.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
FCI Pekin	Po Box 5000 Pekin IL 61555-5000	5-30-2001	$ 15**
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$ N/A
			$
			$

4. How much cash do you and your spouse have? $ N/A
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
N/A	N/A	$ N/A	$ N/A
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value N/A

☐ Other real estate
Value N/A

☐ Motor Vehicle #1
Year, make & model N/A
Value

☐ Motor Vehicle #2
Year, make & model N/A
Value

☐ Other assets
Description N/A
Value

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$ N/A	$ N/A
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
Jahana Jae Fellers	Daughter	5

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ N/A	$ N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ N/A	$ N/A
Home maintenance (repairs and upkeep)	$ N/A	$ N/A
Food	$ N/A	$ N/A
Clothing	$ N/A	$ N/A
Laundry and dry-cleaning	$ N/A	$ N/A
Medical and dental expenses	$ N/A	$ N/A

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, John Jay Fellers, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 15	$ N/A	$ 15	$ N/A
Self-employment	$ N/A	$ N/A	$ N/A	$ N/A
Income from real property (such as rental income)	$ N/A	$ N/A	$ N/A	$ N/A
Interest and dividends	$ N/A	$ N/A	$ N/A	$ N/A
Gifts	$ 50	$ N/A	$ 50	$ N/A
Alimony	$ N/A	$ N/A	$ N/A	$ N/A
Child Support	$ N/A	$ N/A	$ N/A	$ N/A
Retirement (such as social security, pensions, annuities, insurance)	$ N/A	$ N/A	$ N/A	$ N/A
Disability (such as social security, insurance payments)	$ N/A	$ N/A	$ N/A	$ N/A
Unemployment payments	$ N/A	$ N/A	$ N/A	$ N/A
Public-assistance (such as welfare)	$ N/A	$ N/A	$ N/A	$ N/A
Other (specify): _____	$ N/A	$ N/A	$ N/A	$ N/A
Total monthly income:	$ 65	$ N/A	$ 65	$ N/A

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

Federal Inmate

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 29th July, 2002

John Fellers
(Signature)

	You	Your spouse
Transportation (not including motor vehicle payments)	$ N/A	$ N/A
Recreation, entertainment, newspapers, magazines, etc.	$ N/A	$ N/A
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ N/A	$ N/A
Life	$ N/A	$ N/A
Health	$ N/A	$ N/A
Motor Vehicle	$ N/A	$ N/A
Other: _____	$ N/A	$ N/A
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ N/A	$ N/A
Installment payments		
Motor Vehicle	$ N/A	$ N/A
Credit card(s)	$ N/A	$ N/A
Department store(s)	$ N/A	$ N/A
Other: _____	$ N/A	$ N/A
Alimony, maintenance, and support paid to others	$ ~~N/A~~ 340.00 monthly	$ N/A
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ N/A	$ N/A
Other (specify): _____	$ N/A	$ N/A
Total monthly expenses:	$ 340.00	$ _____

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution is reproduced in Appendix "B".

STATEMENT OF THE CASE

On February 24, 2000, police officers Jeff Bliemeister and Michael Garnett went to John Fellers home to arrest him for conspiracy to distribute methamphetamine. After Fellers admitted the officers in his home, the officers told him that they were there pursuant to an indictment and that they wanted to discuss his involvement in the use and distribution of methamphetamine and his associations with certain person named in the indictment. Fellers responded by stating that he had use methamphetamine, and that he knew some of the individuals that were named in the indictment. At no time during this conversation did the police advise Fellers of his rights under Miranda v. Arizona, 384 U.S. 436 (1966).

The officers then escorted Fellers to jail, where they advised him of his Miranda rights. Fellers signed a written Miranda waiver form and agreed to speak with the officers. During this conversation, Fellers reiterated the inculpatory statements made at his home and admitted his association with several more co-conspirators.

Prior to trial, Fellers moved to suppress both the inculpatory statements made at his home and those made at the jail. Fellers argued that the second warned statements should be suppressed on the fruit of the poisonous tree doctrine. The magistrate judge conducted an evidentiary hearing and concluded that Fellers was in custody at the time he made the statements at his home.

Furthermore, the magistrate found that the officers had used deceptive strategems and had interrogated Fellers at his home. The magistrate concluded that the first statements had to be suppressed. Also, the magistrate found that the second statements should be suppressed because the statements made at the jail were the fruits of the first statements which were not preceded by the Miranda warnings. See Appendix "E" (Transcripts of the Suppression Hearing) and Appendix "D" (Order on Suppression Motion).

The district court adopted in part and rejected in part the magistrate's report and recommendation. See Appendix "C" (Memorandum and Order on Suppression Motion). The court agreed that the statements made at Fellers' home should be suppressed. However, the court admitted the second statement Fellers made at the jail after finding that Fellers had knowingly and voluntarily waived his Miranda rights before making those statements. The court believed that the facts of this case fell within the Supreme Court's holding in Oregon v. Elstad, 470 U.S. 298 (1985).

Fellers proceeded to jury trial where the second statements were admitted as evidence. The jury found Fellers had conspired to distribute and to possess with intent to distribute between 50 and 500 grams of methamphetamine in violation of 21 U.S.C. § 846 and § 841(a)(1). Fellers was sentenced to 151 months imprisonment.

On appeal, Fellers argued, inter alia, that the district court should have suppressed his inculpatory statements made

at the jail because the primary taint of the improperly elicited statements made at his home was not removed by the recitation of his Miranda rights at the jail. Fellers also argued that Elstad was distinguishable because Elstad was concerned with the mere failure to administer Miranda warnings, where as here, there was a Sixth Amendment right to counsel violation. The Sixth Amendment right to counsel was violated because Fellers encounter with the police officers constituted a post-indictment interview.

The Eighth Circuit Court of Appeals affirmed Fellers' conviction and sentence on April 8, 2002. See Appendix "A" (United States v. Fellers, 285 F.3d 721 (8th Cir. 2002). In doing so, the Eighth Circuit reasoned that Elstad rendered admissable the statements made by Fellers at the jail. The court also decided that there was no Sixth Amendment violation because Fellers was not interrogated at his home. See Fellers, 285 F.3d at 724.

Circuit Judge Riley filed a concurring opinion disagreeing with the majority opinion, but, nonetheless, affirming the judgment of the court. Judge Riley determined that there was a Sixth Amendment right to counsel violation because the police officers "deliberately elicited" incriminating evidence by telling Fellers they wanted to discuss his involvement in the use and distribution of methamphetamine. Fellers, at 726-727. However, Judge Riley concluded that the Sixth Amendment violation did not take Fellers case outside the rationale of Elstad. Id. at 727.

Shortly thereafter, Fellers filed a timely petition for rehearing with the Eighth Circuit. On May 7, 2002, the Eighth Circuit denied the petition for rehearing. See Appendix "B". This petition for a writ of certiorari now follows.

MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The question of whether Fellers' Sixth Amendment right to counsel was violated and whether the fruit of the poisonous tree doctrine applies to this Sixth Amendment violation was presented to the Eighth Circuit Court of Appeals. The Eighth Circuit rejected this argument on the merits and concluded that there was no Sixth Amendment violation. Thus, the claims were properly presented and reviewed below and are appropriate for this Court's consideration.

REASONS WHY THIS WRIT SHOULD ISSUE

I. STARTING WITH MASSIAH V. UNITED STATES, 377 U.S. 201 (1964), THE SUPREME COURT HAS MADE CLEAR THAT IN A POST-INDICTMENT INTERVIEW WITHOUT THE PRESENCE OF COUNSEL, THE STANDARD IN DETERMINING IF THERE IS A SIXTH AMENDMENT VIOLATION IS WHETHER THE GOVERNMENT AGENTS "DELIBERATELY ELICITED" INFORMATION FROM THE DEFENDANT, INSTEAD OF "INTERROGATED" THE DEFENDANT. THE STANDARDS ARE DISTINCT. THE SUPREME COURT HAS APPLIED THE "DELIBERATELY ELICITED" TEST TO EVERY SIXTH AMENDMENT CASE FOLLOWING MASSIAH. THE SUPREME COURT HAS APPLIED THE "INTERROGATED" TEST ONLY TO CASES CHALLENGING A FIFTH AMENDMENT OR MIRANDA VIOLATION. THE EIGHTH CIRCUIT ERRONEOUSLY APPLIED THE "INTERROGATED" TEST TO A SIXTH AMENDMENT-MASSIAH VIOLATION, WHICH IS AT ODDS WITH SIX DECISIONS OF THIS COURT.

II. THIS COURT HAS ALREADY HELD IN NIX V. WILLIAMS, 467 U.S. 431 (1984), THAT THE FRUIT OF THE POISONOUS TREE DOCTRINE IS APPLICABLE IN THE SIXTH AMENDMENT-MASSIAH CONTEXT. THEREFORE, THE COURT'S DECISION IN OREGON V. ELSTAD, 470 U.S. 298 (1985)-WHICH WAS BASED ON A MIRANDA VIOLATION AND THE ABSENCE OF A CONSTITUTIONAL VIOLATION- IS INAPPOSITE. ONCE AGAIN, THE EIGHTH CIRCUIT ERRONEOUSLY APPLIED A FIFTH AMENDMENT-MIRANDA CASE TO A SIXTH AMENDMENT-MASSIAH VIOLATION. FURTHERMORE, UNDER THE COURT'S PRIOR RULINGS, ALL THE STATEMENTS SHOULD HAVE BEEN SUPPRESSED AS FRUITS OF THE ILLEGAL POST-INDICTMENT INTERVIEW WITHOUT THE PRESENCE OF COUNSEL.

I.

DID THE COURT OF APPEALS ERR WHEN THEY CONCLUDED THAT PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL UNDER MASSIAH V. UNITED STATES, 377 U.S. 201 (1964), WAS NOT VIOLATED BECAUSE PETITIONER WAS NOT "INTERROGATED" BY GOVERNMENT AGENTS; WHEN THE PROPER STANDARD IS WHETHER THE GOVERNMENT AGENT "DELIBERATELY ELICITED" INFORMATION FROM PETITIONER?

The Eighth Circuit Court of Appeals determined that Fellers' Sixth Amendment right to counsel was not violated. Fellers had argued that the conversation that was initiated by the law enforcement officers at his home- violated his right to have counsel present at a post-indictment interview. The Eighth Circuit found that Fellers' right to counsel was not violated because "the officers did not interrogate Fellers at his home." Fellers, 285 F.3d at 724. Nonetheless, the Eighth Circuit never determined whether the officers "deliberately elicited" the information from Fellers.

Circuit Judge Riley filed a concurring opinion, in which he disagreed whether the arresting officers violated Fellers' right to counsel under the Sixth Amendment. For purposes of the Sixth Amendment right to counsel, Judge Riley concluded, that "an interrogation takes place when agents of law enforcement deliberately attempt to elicit incriminating information from the indicted defendant." Fellers, at 726. Further, Judge Riley stated that "[a]lthough the officers in this case did not ask Fellers any questions, they deliberately elicited incriminating information by telling Fellers they wanted to discuss his involvement

in the use and distribution of methamphetamine." Id. at 727. Judge Riley concluded that this conduct violated Fellers' right to counsel. Id.

The question brought to this Court is which standard is to be applied to determine whether Fellers' Sixth Amendment right to counsel was violated.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." The basic contours of this right are well established. See Gideon v. Wainwright, 372 U.S. 335 (1963); United States v. Wade, 388 U.S. 218 (1967). "Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time judicial proceedings have been initiated against him- 'whether by way of formal charge, preliminary hearing, indictment, information or arraignment.'" Brewer v. Williams, 430 U.S. 387, 398 (1977)(quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

There can be no doubt that Fellers had the right to have the assistance of counsel at his post-indictment interviews with law enforcement authorities. "Our cases make it plain that the Sixth Amendment guarantees this right to criminal defendants." Patterson v. Illinois, 487 U.S. 285, 290 (1988); Massiah v. United States, 377 U.S. 201 (1964); Brewer v. Williams, supra; United States v. Henry, 447 U.S. 264 (1980); Maine v. Moulton,

474 U.S. 159 (1985); Michigan v. Jackson, 475 U.S. 625 (1986).

This Court first applied the Sixth Amendment to post-indictment communications between the defendant and agents of the Government in Massiah v. United States, supra. There, after the defendant had been charged by indictment, he made incriminating statements to his codefendant, who was an agent of the Government. In reversing the conviction, the Court held that the defendant was denied "the basic protections of [the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had **deliberately elicited** from him." Massiah, at 206 (emphasis added).

In Brewer v. Williams, supra, this Court left open to question whether the Government must deliberately elicit or interrogate a defendant in a post-indictment interview, to violate a defendant's Sixth Amendment right to counsel. In Brewer, the Court followed Massiah, and concluded that the post-indictment interview violated defendant's right to counsel. When confronted with whether the Court should find if the Government had deliberately elicted or interrogated the defendant, the Court stated that: "There can be no serious doubt, either, that Detective Leaming deliberately and designedly set out to elicit information from Williams just assurely as- and perhaps more effectively then- if he had formally interrogated him." Brewer, 430 U.S. at 399. Justice Stewart- who delivered the opinion of the Court- went on to state that "the clear rule of Massiah is that once adversarial proceedings have commenced against, an individual, he has the right to legal

representation when the government interrogates him." Id. at 401. Although Justice Stewart left debatable the question whether the government must affirmatively interrogate, instead of deliberately elicit information from the accused in a post-indictment interview, Justice Stewart later clarified the difference between the two in Rhode Island v. Innis, 446 U.S. 291 (1980).

The Court, in Innis, granted certiorari to address the meaning of interrogation under Miranda v. Arizona, 446 U.S. 934 (1966). The Court stated that "the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Innis, 446 U.S. at 301. Turning to the facts of the case, the Court determined that the defendant was not subjected to the functional equivalent of questioning, since it could not be said that the officers should have known that their conversation was reasonably likely to elicit an incriminating response from defendant. Id. at 302-303.

Justice Stewart- who delivered the opinion of the court- this time clarified the difference between deliberately elicited and interrogated. Justice Stewart noted that:

> "There is language in the opinion of the Rhode Island Supreme Court in this case suggesting that the definition of 'interrogation' under Miranda is informed by this Court's decision in Brewer v. Williams. This suggestion is erroneous. Our decision in Brewer rested solely on the Sixth and Fourteenth Amendment right to counsel. That right, as we held in Massiah, prohibits law enforcement officers from 'deliberately eliciting' incriminating information from a defendant in the absence of counsel after a formal charge against the defendant has been filed. Custody in such a case is not controlling; indeed, the petitioner

> in Massiah was not in custody. By contrast, the right to counsel in the present case is based not on the Sixth and Fourteenth Amendments, but rather on the Fifth and Fourteenth Amendments as interpreted in the Miranda opinion. The definitions of 'interrogation' under the Fifth and Sixth Amendments, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct."

Innis, 446 U.S. at 300 n.4 (citations omitted).

In Henry v. United States, supra, the Court was once again asked to determine whether the government must deliberately elicit or interrogate an accused in a post-indictment interview to violate an accused's Sixth Amendment right to counsel. The Henry Court faced a case in which the Government had placed a paid informant in a jail cell with the defendant. The Court granted certiorari to decide whether under the facts of the case, the Government agent deliberately elicited incriminating statements from the defendant within the meaning of Massiah. Although the informant did not ask the defendant any questions, the Court, nonetheless, found that the informant was not a passive listener; rather, the informant had some conversations with the defendant while he was in jail and the defendant's incriminating statements were "the product of this conversation." Henry, 447 U.S. at 271. Continuing, the Court found that "[c]onversation stimulated in such circumstances may elicit information that an accused would not intentionally reveal." Id. at 273. And that "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." Id. at 274.

The Government, in Henry, argued that the Court should look to whether the defendant was interrogated to determine a Massiah violation. The Court rejected this argument. In doing so, the Court stated that "[w]hile affirmative interrogation, absent waiver, would certainly satisfy Massiah, we are not persuaded, as the Government contends, that Brewer v. Williams, modified Massiah's deliberately elicited test." Henry, at 271. The Court went on to cite, in approval, Justice Stewart's footnote in Innis.

From these precedents, it is clear that once a defendant is indicted the Government may not deliberately elicit information from him without the presence of counsel. It is equally clear that once a defendant raises a Sixth Amendment-Massiah challenge, the question of whether the defendant was interrogated becomes constitutionally irrelevant. See, Michigan v. Jackson, 475 U.S. 625, 632 n.5 (1986)("[A]fter the initiation of adversarial judicial proceedings, the Sixth Amendment provides a right to counsel at a critical stage even when there is no interrogation and no Fifth Amendment applicability.") Thus, the Eighth Circuit clearly erred when it determined that Fellers' Sixth Amendment right to counsel was not violated because Fellers was not interrogated at his home. 1/

1/ Also, it appears that the Eighth Circuit violated its own precedent when it determined that since the officers did not interrogate Fellers, his Sixth Amendment right to counsel was not violated. See, Moore v. United States, 178 F.3d 994, 999 (8th Cir. 1999)(Holding that a Massiah violation has occured when the government "deliberately elicit[s] incriminating statements" from a defendant.).

It is unquestionable that the police officers deliberately elicited information from Fellers in the post-indictment interview at his home. The first statement the officers made to Fellers was we need to talk to you about your involvement in the use and distribution of methamphetamine. Suppression Hearing, pages 40, 42, 53. See also, Moulton, 474 U.S. 177 n.14 (Defendant's Sixth Amendment right to counsel "was violated as soon as the State's agent engaged Moulton in conversation about the charges pending against him."). Also, the officers said they wanted to talk to Fellers about his use and distribution of methamphetamine as it pertained to individuals named in the indictment. Supp.H., page 42. These comments could have no other practical purpose other than to elicit a response from Fellers. "By intentionally creating a situation likely to induce [Fellers] to make incriminating statement without the assistance of counsel, the Government violated [Fellers'] Sixth Amendment right to counsel." Henry, 447 at 274. Officer Bleimeister even acknowledged this fact when he said he was not suprised that his comments got a response from Fellers. Supp.H., page 52. 2/

Furthermore, the officers already knew that Fellers had been indicted, for they were there to arrest him pursuant to this indictment. Thus, it cannot be said that the officers proceeded to deliberately elicit information out of a mistaken belief that Fellers had not yet been charged. It is clear that Fellers had a Sixth Amendment right to have counsel present

2/ In fact, the Magistrate Judge concluded that the officers used deceptive strategems and that Fellers was interrogated under the standard set forth in Innis. Supp.H., pages 104-105.

when the officers conducted this post-indictment interview. As the Massiah Court noted, if the Sixth Amendment "is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse." Massiah, 377 U.S. at 206.

II.
SHOULD THE SECOND STATEMENTS- WHICH WERE PRECEDED BY MIRANDA WARNINGS- HAVE BEEN SUPPRESSED AS FRUITS OF THE ILLEGAL POST-INDICTMENT INTERVIEW WITHOUT THE PRESENCE OF COUNSEL, UNDER THIS COURT'S DECISIONS IN NIX V. WILLIAMS, 467 U.S. 431 (1984), AND BROWN V. ILLINOIS, 590 U.S. 590 (1975)?

The Eighth Circuit held that the second statements made at the jail, after the advisement of Miranda rights, were admissible at Fellers' trial. The Eighth Circuit concluded that Oregon v. Elstad, 470 U.S. 298 (1985), rendered admissible the statements made by Fellers at the jail. Fellers, 285 F.3d at 724. However, since the Eighth Circuit found no Sixth Amendment-Massiah violation, they never determined whether the second statements should have been excluded as fruits of the illegal post-indictment interview.

The exclusionary rule, which bars the admission of evidence obtained in violation of the Constitution, extends beyond the direct products of police misconduct to evidence derived from the illegal conduct, or "fruit of the poisonous tree." Nardone v. United States, 308 U.S. 338, 341 (1939). Assuming the primary illegality can be established, the Supreme Court has held that "the exclusionary rule applies not only to the illegally obtained evidence itself, but also to other incriminating evidence." Nix v. Williams, 467 U.S. 431, 441 (1984)(citing Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)). Although the cases which mark the origin and developement of the "fruit of the poisonous tree" doctrine involved violations of the

Fourth Amendment guarantee against searches and seizures. 3/ the doctrine also applies to the fruits of evidence obtained in violation of an accused's Sixth Amendment right to counsel. See, e.g., United States v. Wade, 388 U.S. 218 (1967).

The Eighth Circuit erroneously determined that this Court's ruling in Elstad was applicable to the facts of this case. In Elstad, the Court granted certiorari to consider whether the Self-Incrimination Clause of the Fifth Amendment required suppression of a confession, made after proper Miranda warnings and a valid waiver of rights, solely because the police had obtained an earlier voluntary but unwarned admission from the defendant. In holding that the second warned statement was admissible, the Court stated:

> "It [would be] an unwarranted extension of Miranda to hold that simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period."

Elstad, 470 U.S. at 309.

The Elstad Court was concerned with only the Fifth Amendment and specifically a violation of Miranda warnings. Moreover, the Court described the Miranda warnings as prophylactic and not themselves, a violation of the Fifth Amendment. Thus, the Court in Elstad, based its ruling on the absence of a constitutional violation. See, Elstad, 470 U.S. at 305 ("Respondent's contention that his confession was tainted by the earlier failure of the police to provide Miranda warnings and must be excluded

3/ See, e.g. Silverthorne, 251 U.S. 385; Wong Sun v. United States, 371 U.S. 471 (1963).

as 'fruit of the poisonous tree' **assumes the existence of a constitutional violation.**")(emphasis added): Id. at 306 ("The Miranda exclusionary rule, however,... sweeps more broadly than the Fifth Amendment itself. **It may be triggered even in the absence of a Fifth Amendment violation.**")(emphasis added); Id. at 309 ("If errors are made by law enforcement officers in administering the prophylactic Miranda procedures, they should not breed the same irremediable consequences **as police infringement of the Fifth Amendment itself.**")(emphasis added). Since the Elstad Court was concerned with the applicability of the fruits doctrine to Miranda, and the absence of a constitutional violation, whereas here, there was a Sixth Amendment-Massiah violation, Elstad is distinguishable from the case at bar. Just as the Eighth Circuit applied the wrong test to determine whether the Government had deliberately elicited (Sixth Amendment) or interrogated (Fifth Amendment) Fellers, the Eighth Circuit also erroneously applied Elstad (Miranda-Fifth Amendment) to a Sixth Amendment-Massiah violation.

The Supreme Court has already applied the fruit of the poisonous tree doctrine to a Massiah violation. The Court in Nix v. Williams, 467 U.S. 431 (1984), concluded that more may, at times, be necessary to neutralize the taint produced by the governement deliberately eliciting information in a post-indictment interview. Specifically, the Nix Court held that a violation of Massiah requires suppression of all derivative evidence gleaned through exploitation of the Government's wrongdoing.

Id. at 441-43. Thus, the appropriate remedy for a violation of Massiah includes not only suppression of all evidence directly obtained through governmental misconduct, but also suppression of all evidence that can properly be designated as the fruits of that conduct.

When determining whether a particular piece of evidence is the fruit of police illegality, the Court must ask "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun, 371 U.S. at 488. 4/

In order for the casual chain, between the illegal post-indictment interview and the statements made subsequent thereto, to be broken, Wong Sun requires that it be "sufficiently an act of free will to purge the primary taint." Wong Sun, 371 U.S. at 486. This Court, in Brown v. Illinois, 422 U.S. 590 (1975), held that the Miranda warnings alone cannot always make the act sufficiently a product of free will to break the

4/ Four exceptions to the fruit of the poisonous tree doctrine have developed. First, facts obtained as a result of a constitutional violation still may be used if they can be proven by a lawful source independent of the violation. Silverthorne. Second, evidence which would have ultimately been discovered by lawful means also is admissible. Nix. Third, if the casual connection between the constitutional violation and the evidence in question is so attenuated as to dissipate the taint, the evidence is admissible. Nardone. Finally, if the government's agents have a good faith belief that there actions were constitutionally permissible- such, as where an officer arrests an individual in reliance on a warrant later invalidated- the evidence is admissible. Arizona v. Evans, 514 U.S. 1 (1995). None of these exceptions applies to the facts of this case.

casual connection between the illegality and the confession. Id. 422 U.S. at 603. The Brown Court stated that "[n]o single fact is dispositive." Id. In discussing the factors to be considered in whether a confession is obtained by the exploitation of a constitutional violation, the Court noted that the "temporal proximity of the arrest and confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant." Id. at 603-604 (internal citation omitted). "And the burden of showing admissibility rests, of course, on the prosecution." Id.

As already noted, the Eighth Circuit did not undertake the inquiry suggested by Wong Sun and Brown, Nevertheless, as in Brown, 422 U.S. at 604, and Rawlings v. Kentucky, 448 U.S. 96 (1980), the suppression hearing resulted in a record of ample detail for this Court to make a determination.

First of all, Fellers' second statement was separated from the illegal post-indictment interview by less than a half-hour. See, Supp.H. pages 44-45, 85, 106. See also, Brown, at 604; Dunaway v. New York, 442 U.S. 200, 218 (1979)(Where the time between the illegal arrest and the confession was two hours).

Furthermore, there was no intervening event of significance between the first and second statements. Although the second statement were preceded by Miranda warnings, the warnings are not a "cure-all", and cannot "make the act sufficiently a product of free will to break... the casual connection between the

illegality and the confession." Brown, at 602-603. Fellers received the Miranda warnings only moments before he made incriminating statements. The Brown Court treated this consideration as important in determining whether the statements at issue were obtained by exploitation of a constitutional violation. See, Rawlings, 448 U.S. at 107.

The post-indictment interview- specifically, the officers telling Fellers that they were there to discuss his involvement in the use and distribution of methamphetamine- had a "quality of purposefulness" in that it was an "expedition for evidence" undertaken "in the hope that something might turn up." Brown, at 605. The first thing officer Bliemeister said to Fellers was, were here to discuss your involvement in the use and distribution of methamphetamine. On a previous occassion, Bliemeister had been to Fellers' home and said the same thing, that I'm here to discuss your involvement in the use and distribution of methamphetamine. Supp.H. pages 35-39. Both officers, testified that the comments made to Fellers at his home was not part of their training. Supp.H. pages 51 and 82. After the officers arrested and transported Fellers to the jail, they advised him of his Miranda warnings and then they ask him to go into greater detail about his involvement in the use and distribution of methamphetamine. Supp.H. pages 46-47. There was no significant break in the stream of events to insulate the second warned confession from the damning impact of the first confession. See, Brown, at 605 n.12 ("The fact that Brown had made one

statement, believed by him to be admissible,... bolstered the pressure for him to give the second, or at least vitiated any incentive on his part to avoid self-incrimination."). It is clear that the officers deliberately and designedly set out to elicit incriminating statements from Fellers. As such, the second statements were not a sufficient act of free will to purge the primary taint.

Other than the difference between the initial constitutional violation, the situation in this case is virtually a replica of the situation in Brown and Wong Sun. This Court's ruling in Nix, requires that since the government violated Fellers' Sixth Amendment rights, all of the statements made by Fellers should have been suppressed as fruits of that illegal conduct.

The Eighth Circuit's determination that Fellers' Sixth Amendment right to counsel was not violated is at odds with at least six decisions of the Supreme Court. Furthermore, the Eighth Circuit's decision that the fruit of the poisonous tree doctrine is not applicable to a Sixth Amendment violation contradicts two decisions of this Court. For the reasons stated above, this Court should grant this writ to correct these errors made by the Eighth Circuit.

CONCLUSION

Wherefore, it is respectfully requested that this Honorable Court grant this writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Dated this 29th day of July, 2002

Respectfully submitted,

John J. Fellers

CERTIFICATE OF SERVICE

I, John J. Fellers, do hereby certify that a true and correct copy of the Petition for Writ of Certiorari, in the above-entitled case, was served on the parties below. Said Petition was sent by U.S. Mail, postage pre-paid on this 29th day of July, 2002.

John J. Fellers

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TED STATES COURT OF A ALS

FOR THE EIGHTH CIRCUIT

No. 01-2045

United States of America,

Appellee,

vs.

John J. Fellers,

Appellant.

Appeal from the United States District Court for the District of Nebraska

The petition for rehearing by the panel filed by appellant has been considered by the court and is denied.

(5193-010199)

May 7, 2002

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

ed States v. Beck, 140 F.3d 1129, 1137–38 (8th Cir.1998), or *United States v. Wood*, 106 F.3d 942, 946–47 (10th Cir.1997), in which a combination of innocent factors was not enough to create reasonable suspicion. The district court did not therefore err when it concluded that the totality of the circumstances provided Dixon with reasonable suspicion to detain Linkous and Yates for the dog sniff.

[9, 10] The length of time Linkous and Yates were detained was not unreasonable. The time elapsed between the initial stop of the van and the arrest of Yates and Linkous was only nineteen minutes. The record indicates that they were delayed no more than seven or eight minutes from the time Dixon radioed for assistance until the dog completed its sniff of the van. A short detention for a dog sniff after the completion of a traffic stop does not violate the Fourth Amendment. *See United States v. $404,905.00 in U.S. Currency*, 182 F.3d 643, 648–49 (8th Cir.1999), *cert. denied*, 528 U.S. 1161, 120 S.Ct. 1175, 145 L.Ed.2d 1083 (2000) (two minute delay for dog sniff a de minimis intrusion); *Morgan*, 270 F.3d at 632 (same conclusion for a delay of less than ten minutes). In this case, Officer Dixon had not even had time to write any traffic citations at the point at which his suspicions were reasonably aroused and he radioed for assistance. The traffic stop had not then been completed, and the dog arrived within several minutes. Once it alerted to the presence of drugs in the van, there was probable cause to search the vehicle. *Bloomfield*, 40 F.3d at 919.

In sum, we conclude that Linkous and Yates were not illegally detained and that the district court did not err in denying Linkous' suppression motion. The judgment is therefore affirmed.

UNITED STATES of America, Appellee,

v.

John J. FELLERS, Appellant.

No. 01-2045.

United States Court of Appeals, Eighth Circuit.

Submitted: Oct. 16, 2002.

Filed: April 8, 2002.

Defendant was convicted in the United States District Court for the District of Nebraska, Lyle E. Strom, J., of conspiracy to possess with intent to distribute methamphetamine, and he appealed. The Court of Appeals, Wollman, Chief Judge, held that: (1) failure of officers to administer *Miranda* warnings before defendant made inculpatory statements at his home did not require suppression of his subsequent jailhouse statements; (2) evidence was sufficient for conviction; (3) the district court did not abuse its discretion in denying a motion for a new trial based upon newly discovered evidence; (4) sentence was proper though based upon a finding of drug quantity that exceeded that found by the jury; and (5) defendant was not entitled to a two-level reduction as a minor participant.

Affirmed.

Riley, Circuit Judge, filed a concurring opinion.

1. Criminal Law ⇐1134(3)

The voluntariness of a confession is a legal inquiry subject to plenary appellate review.

2. Criminal Law ⇐412.1(1)

To determine if defendant's inculpatory statements were voluntary, court must determine if, in light of the totality of the circumstances, the pressures exerted by the authorities overwhelmed the defendant's will.

3. Criminal Law ⇐519(1)

Coercive police activity is a necessary predicate to finding that a confession is not voluntary in the constitutional sense.

Criminal Law ⇐412(4)

Failure of officers to administer *Miranda* warnings before defendant made inculpatory statements at his home when officers went there to arrest him did not require suppression of his subsequent jailhouse statements, where those statements were knowingly and voluntarily made following the administration of the *Miranda* warnings.

5. Criminal Law ⇐412.2(3)

Officers' failure to administer the *Miranda* warnings at defendant's home when they went there to arrest him did not violate his Sixth Amendment right to counsel on theory the encounter constituted a post-indictment interview, where the officers did not interrogate defendant at his home, though he did make inculpatory statements. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐404.60

Methamphetamine seized from a co-conspirator was admissible in prosecution for conspiracy to possess with intent to distribute methamphetamine, where the evidence established that the seized drugs were part of the on-going conspiracy for which defendant was prosecuted.

7. Witnesses ⇐267

There was no abuse of discretion in district court's limiting defendant's cross-examination of a witness, where defendant was allowed to cross-examine the witness about the issues with which he was concerned.

8. Conspiracy ⇐47(12)

Testimony from multiple witnesses that they bought from and sold to defendant methamphetamine, including testimony that the quantities sold to defendant were sufficient for redistribution to others, was sufficient to support conviction for conspiracy to possess with intent to distribute methamphetamine, despite defendant's assertion that the testimony of his coconspirators was not credible and should have been disregarded. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

9. Criminal Law ⇐942(1)

The district court did not abuse its discretion in denying a motion for a new trial based upon newly discovered evidence, where the new evidence defendant pointed to was merely impeachment evidence.

10. Jury ⇐34(1)

Sentence was proper though based upon a finding of drug quantity that exceeded that found by the jury, where the sentence did not exceed the statutory maximum allowable under the jury's verdict.

11. Criminal Law ⇐1023(11)

Where the district court was aware of its authority to depart downward, its refusal to exercise its discretion to depart from the applicable guideline range was unreviewable.

12. Sentencing and Punishment ⇐764

In sentencing for conspiracy to possess with intent to distribute methamphetamine, defendant was not entitled to a two-level reduction as a minor participant, despite contention that the majority of the evidence showed him as receiving the drugs, not distributing them, where there was sufficient evidence indicating that he had a larger role in the conspiracy than being a mere user.

Sean J. Brennen, Lincoln, NE, argued, for appellant.

Janice M. Lipovsky, Asst. U.S. Atty., Lincoln, NE, for appellee.

Before: WOLLMAN,[1] Chief Judge, LAY, and RILEY, Circuit Judges.

WOLLMAN, Chief Judge.

John Fellers appeals from the judgment of conviction entered and the sentence imposed by the district court [2] for conspiracy to possess with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. We affirm.

I.

On February 24, 2000, two policemen went to Fellers's Lincoln, Nebraska, home to arrest him for conspiracy to distribute methamphetamine. After Fellers admitted the police to the house, they told him that they were there pursuant to an indictment and that they wanted to discuss his involvement in the use and distribution of methamphetamine and his associations with certain persons. Fellers responded by stating that he had associated with the named persons and that he had used methamphetamine. At no time during this conversation did the police advise Fellers of his *Miranda* rights.

The officers then escorted Fellers to jail, where they advised him of his *Miranda* rights. Fellers signed a written *Miranda* waiver form and agreed to speak with the officers. During this conversation, Fellers reiterated the inculpatory statements made at his home and admitted his association with several more co-conspirators.

Fellers moved to suppress both the inculpatory statements made at his home and those made at the jail. A magistrate judge found that both sets of statements should be suppressed because Fellers was in custody at the time he made the statements at his home, the officers used deceptive stratagems to prompt those statements, and the subsequent statements at the jail would not have been made but for the prior ill-gotten statements. The district court agreed that the statements made at Fellers's home should be suppressed, but admitted the statements made at the jail after finding that Fellers had knowingly and voluntarily waived his *Miranda* rights before making those statements.

The jury found that Fellers had conspired to distribute and to possess with intent to distribute between 50 and 500 grams of methamphetamine. At sentencing, the district court held Fellers responsible for more than 500 grams of methamphetamine and denied Fellers's request for a mitigating role adjustment, as well as his motion for a downward departure. After finding that category II did not adequately reflect the seriousness of Fellers's past criminal conduct, the district court raised Fellers's criminal history category to III and sentenced him to 151 months' imprisonment.

1. The Honorable Roger L. Wollman stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on January 31, 2002. He has been succeeded by the Honorable David R. Hansen.

2. The Honorable Lyle E. Strom, United States District Judge for the District of Nebraska.

II.

Fellers argues that the district court should have suppressed his inculpatory statements made at the jail because the primary taint of the improperly elicited statements made at his home was not removed by the recitation of his *Miranda* rights at the jail.

[1–3] The voluntariness of a confession is a legal inquiry subject to plenary appellate review. *United States v. Robinson*, 20 F.3d 320, 322 (8th Cir.1994). To determine if Fellers's inculpatory statements at the jail were voluntary, we must determine if, "in light of the totality of the circumstances, the pressures exerted by the authorities overwhelmed the defendant's will. Coercive police activity is a necessary predicate to finding that a confession is not voluntary in the constitutional sense." *Id.* (citing *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986)) (internal citation omitted).

[4] Contrary to Fellers's contention otherwise, we conclude that *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), renders admissible the statements made by Fellers at the jail. In that case, two officers went to Elstad's residence with a warrant to arrest him for the burglary of a neighbor's home. One of the officers told Elstad that he believed that Elstad had been involved in the burglary, whereupon Elstad responded "Yes, I was there." The officers then transported Elstad to the sheriff's office, where, approximately one hour later, they advised Elstad of his *Miranda* rights. Elstad indicated that he understood his rights and that he wished to waive them. Elstad then signed a written statement explaining his role in the burglary. The trial court suppressed Elstad's initial oral statement, but admitted his written confession. *Id.* at 300–302, 105 S.Ct. 1286. In holding that the statement given at the sheriff's office was admissible, the Court stated:

> It [would be] an unwarranted extension of *Miranda* to hold that simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

Elstad, 470 U.S. at 309, 105 S.Ct. 1285.

[5] Citing *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988), Fellers argues that the officers' failure to administer the *Miranda* warnings at his home violated his sixth amendment right to counsel inasmuch as the encounter constituted a post-indictment interview. *Patterson* is not applicable here, however, for the officers did not interrogate Fellers at his home.

Finally, we conclude that the record amply supports the district court's finding that Fellers's jailhouse statements were knowingly and voluntarily made following the administration of the *Miranda* warning. *See Elstad*, 470 U.S. at 314–15, 105 S.Ct. 1285; *Robinson*, 20 F.3d at 322. Accordingly, the district court did not err in denying the motion to suppress the statements made at the jail.

III.

[6] Fellers argues that the district court should not have admitted methamphetamine seized from a co-conspirator. We review under an abuse of discretion standard a district court's rulings on the admissibility of evidence. We find no abuse of discretion here, for the evidence established that the seized drugs were part of the on-going conspiracy for which Fellers was prosecuted. *United States v. Maynie*, 257 F.3d 908, 915 (8th Cir.2001).

[7] Fellers next argues that the district court erred in limiting his cross examination of a witness. "Absent a clear abuse of discretion and a showing of prejudice, we will not reverse a district court's ruling limiting cross-examination of a prosecution witness on the basis that it impermissibly infringed [the defendant's] right of confrontation." *United States v. Stewart*, 122 F.3d 625, 627 (8th Cir.1997). The record reveals that Fellers was allowed to cross-examine the witness about the issues with which he was concerned, and thus we find no abuse of discretion in the district court's ruling.

[8] Fellers contends that the evidence was insufficient to support the verdict. "When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the verdict and give the government the benefit of all reasonable inferences. We will reverse 'only if a reasonable jury must have had a reasonable doubt that the elements of the crime were established.'" *United States v. Santana*, 150 F.3d 860, 864 (8th Cir.1998) (quoting *United States v. Carlisle*, 118 F.3d 1271, 1273 (8th Cir.1997)) (internal quotations and citations omitted). Fellers's argument rests almost entirely on his assertion that the testimony of his co-conspirators was not credible and should have been disregarded. "Assessing the credibility of witnesses is a matter properly left to the jury." *Santana*, 150 F.3d at 864 (citing *United States v. Anderson*, 78 F.3d 420, 422–23 (8th Cir.1996)). The jury heard testimony from multiple witnesses that they bought from and sold to Fellers methamphetamine, including testimony that the quantities sold to Fellers were sufficient for redistribution to others. This testimony was sufficient to support Fellers's conviction.

[9] Fellers contends that the court erred in denying his motion for a new trial based upon newly discovered evidence.

> We review under an abuse of discretion standard the denial of a motion for a new trial. A defendant is entitled to a new trial based on newly discovered evidence only if he can show (1) that the evidence was not discovered until after the trial; (2) that due diligence would not have revealed the evidence; (3) that the evidence is not merely cumulative or impeaching; (4) that the evidence is material; and (5) that the evidence is such as to be likely to lead to acquittal.

United States v. Zuazo, 243 F.3d 428, 431 (8th Cir.2001) (citing *Lindhorst v. United States*, 658 F.2d 588, 602 (8th Cir.1981)). Because the new evidence Fellers points to is merely impeachment evidence, the district court did not abuse its discretion in denying the motion.

IV.

Fellers's remaining arguments concern alleged errors committed in calculating his sentence under the Sentencing Guidelines.

[10] Fellers argues that the district court erred in calculating the amount of drugs for which he was responsible. "We review a district court's drug quantity calculations for clear error, and we will reverse only if our examination of the entire record 'definitely and firmly convinces us that a mistake has been made.'" *Santana*, 150 F.3d at 864 (quoting *United States v. Moss*, 138 F.3d 742, 745 (8th Cir.1998)). The jury found that Fellers was responsible for at least 50 but less than 500 grams of methamphetamine. The district court determined that the quantity of methamphetamine that was reasonably foreseeable

to Fellers during the course of the conspiracy was more than 500 grams but less than 1.5 kilograms, a finding that we conclude is not clearly erroneous. Fellers argues that even though his sentence does not exceed the statutory maximum allowable under the jury's verdict, the sentence should be reversed because it is based upon a finding of drug quantity that exceeds that found by the jury. Fellers acknowledges that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), does not require such a result, and we decline to extend *Apprendi* to encompass Fellers's situation. As we held in *United States v. Hollingsworth*, 251 F.3d 871, 878 (8th Cir. 2001), it is "proper for the sentencing judge to then make more exact calculations for purposes of computing the offense level under the guidelines and determining where the sentence will actually fall within the statutory range determined by the jury's verdict."

Fellers contends that the district court erred in finding that his criminal history category did not adequately reflect the seriousness of his past criminal conduct. We review the district court's departure from the Sentencing Guidelines for an abuse of discretion. *United States v. Pugsley*, 240 F.3d 286, 293 (8th Cir.2001). The court may depart upward if "reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." U.S.S.G. § 4A1.3. Without recounting the details of Fellers's past criminal conduct, we conclude that the district court did not abuse its discretion in determining that an upward departure was warranted.

[11] Fellers challenges district court's denial of his motion for downward departure. "So long as a district court is aware of its authority to depart downward, as it clearly was in this case, its refusal to exercise its discretion to depart from the applicable guideline range is unreviewable." *United States v. Evidente*, 894 F.2d 1000, 1004–05 (8th Cir.1990), and thus Fellers's challenge fails.

[12] Finally, Fellers argues that the district court erred in denying him a two-level reduction as a minor participant. "[W]hether a defendant qualifies for a minor participant reduction is a question of fact, the determination of which we review for clear error." *United States v. Alvarez*, 235 F.3d 1096, 1099 (8th Cir.2000) (quoting *United States v. Hale*, 1 F.3d 691, 694 (8th Cir.1993)). Fellers argues that he was less culpable than other participants because the majority of the evidence showed him as receiving the drugs, not distributing them. There was sufficient evidence indicating that Fellers had a larger role in the conspiracy than being a mere user, however, and thus the district court did not err in finding that Fellers was not a minor participant in the conspiracy.

The judgment is affirmed.

RILEY, Circuit Judge, concurring.

In all respects but one, I concur in the Court's well-reasoned opinion. My disagreement, which does not affect the ultimate resolution of this case, concerns whether the arresting officers violated Fellers's right to counsel under the Sixth Amendment.

Because Fellers was under indictment at the time of his arrest, he had a constitutional right to the presence of counsel during police interrogation. *Massiah v. United States*, 377 U.S. 201, 205–06, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). For purposes of this right, an interrogation takes place when agents of law enforcement deliberately attempt to elicit incriminating information from the indicted defendant. *See id.* at 206, 84 S.Ct. 1199. Although the officers in this case did not ask Fellers any questions, they deliberately elicited incriminating information by telling Fellers they wanted to discuss his involvement in the use and distribution of methamphetamine. This post-indictment conduct outside the presence of counsel violated Fellers's right to counsel under the Sixth Amendment. *See United States v. Henry*, 447 U.S. 264, 270–71, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980); *Brewer v. Williams*, 430 U.S. 387, 399–401, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); *cf. Rhode Island v. Innis*, 446 U.S. 291, 300–02 & 300 n. 4, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).

Nevertheless, I do not believe this constitutional violation takes Fellers's case outside the rationale of *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). The Supreme Court "has never held that the psychological impact of voluntary disclosure of a guilty secret ... compromises the voluntariness of a subsequent informed waiver." *Id.* at 312, 105 S.Ct. 1285. Fellers knowingly and voluntarily waived his Sixth Amendment rights at the jail, and his subsequent statements were thus admissible at his criminal trial. Accordingly, I concur in the judgment of the Court.

UNITED STATES of America, Appellee,

v.

Daniel GREATWALKER, Appellant.

No. 01-3005.

United States Court of Appeals, Eighth Circuit.

Submitted: Feb. 12, 2002.

Filed: April 8, 2002.

Defendant pleaded guilty to first-degree murder on an Indian reservation and, following denial of motion to withdraw plea, was sentenced by the United States District Court for the District of North Dakota, Patrick A. Conmy, J. Defendant appealed. The Court of Appeals, Fagg, Circuit Judge, held that 35 year sentence for first degree murder, pursuant to plea bargain, was illegal, requiring withdrawal of the plea.

Vacated and remanded.

1. Sentencing and Punishment ⇐31

A sentence is illegal when it is not authorized by the judgment of conviction or when it is greater or less than the permissible statutory penalty for the crime.

2. Criminal Law ⇐2163.1)

Homicide ⇐354(2)

Where the Government had not sought the death penalty, life imprisonment was the applicable mandatory sentence for defendant's plea to first-degree murder, and absent applicability of a departure for substantial assistance or a safety valve departure, 35 year sentence, pursuant to plea bargain, was illegal, requiring withdrawal of the plea when defendant was not willing to accept a life sentence on the guilty plea. 18 U.S.C.A. §§ 1111, 3553(e, f).

3. Criminal Law ⇐273.1(2)

There can be no plea bargain to an illegal sentence, even when a defendant, prosecutor, and court agree on a sentence, the court cannot give the sentence effect if it is not authorized by law.

4. Criminal Law ⇐2163.1)

When a defendant has entered a plea bargain contemplating an illegal sentence,

FILED
U.S. DISTRICT COURT
DISTRICT OF NEBRASKA
00 APR 20 PM 1:55
GARY D. MCFARLAND
CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	4:00CR3014
	)	
v.	)	
	)	ORDER
JOHN J. FELLERS,	)	
	)	
Defendant.	)	

A hearing on the defendants motion to suppress was held before me this date. At the commencement of the hearing the defendant withdrew that portion of the motion concerning the shotguns and rifles in his residence, the government conceding that they would not be used by the government in this case. The hearing proceeded on the remainder of the motion, pertaining to defendant's statements.

At the conclusion of the hearing I read into the record my findings and recommendation. For the reasons stated from the bench at the conclusion of the hearing,

IT THEREFORE HEREBY IS RECOMMENDED to the Hon. Lyle E. Strom, United States Senior District Judge, pursuant to 28 U.S.C. 636(b)(1)(B), that the motion to suppress, filing 13, be GRANTED in the respects noted in my comments on the record, and DENIED in all other respects.

FURTHER, IT HEREBY IS ORDERED:

1. This report and recommendation shall be deemed to be filed at the time the transcript of the hearing is filed with the clerk.

2. When the transcript of this hearing is filed, the clerk shall immediately notify the attorneys for the parties.

3. The parties are notified that any failure to file an objection to this report and recommendation within the time permitted by the local rules may be deemed a waiver of the right to appeal the trial judge's adoption of this report and recommendation.

APR 2 9 2000
BY:

4. That portion of the motion to suppress, filing 13, which addresses firearms found at the defendant's residence, is deemed withdrawn.

Dated April 20, 2000.

BY THE COURT:

David L. Piester
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

JUN 0 9 2000

UNITED STATES OF AMERICA, Plaintiff, v. JOHN J. FELLERS, Defendant.	4:00CR3014 MEMORANDUM AND ORDER

This matter is before the Court on the report and recommendation of the magistrate judge (Filing No. 21, pp. 102-108), the defendant's objection to the report and recommendation (Filing No. 22), and the government's objection to the magistrate judge's report and recommendation (Filing No. 23). Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has conducted a *de novo* review of defendant's motion, the transcript of the hearing on said motion (Filing No. 21), the magistrate judge's report and recommendation, the objections of the parties, together with their supporting briefs.

The magistrate judge found that the defendant was in custody at the time he made certain statements in his home, that he was not Mirandized and that his statements were in response to statements of the officers which the magistrate judge found to be implicitly questions. The magistrate judge further found that no strong-armed tactics were used, but he did find there was use of deceptive stratagems in that the officers told the defendant the purpose of their visit was to discuss his role in methamphetamine use and distribution when their primary purpose was to arrest him.

The magistrate judge concluded that all statements made by the defendant at his home prior to his being taken to the police station and the reading of his *Miranda* rights and all statements made by the defendant at the police station which referred to or addressed the specific individuals who were identified by the officers at defendant's home prior to his formal arrest and transportation to the police station be suppressed.

The government's motion seeks an order from the Court rejecting the magistrate judge's report and recommendation in its entirety and denying defendant's motion to suppress. The defendant's objections specifically seek a clearer definition of the scope of the magistrate judge's order of suppression. The Court finds that the magistrate judge's recommendation is too broad and that it should be accepted by the Court only to the extent that all comments or statements made by the defendant at his home prior to his being taken to the police station should be suppressed. The Court finds that defendant was properly given his *Miranda* warnings, that he acknowledged he understood them and that he knowingly and voluntarily consented to speak with the officers, and, therefore, statements he made thereafter are admissible to the extent that they are relevant to any of the issues in the case.

DISCUSSION

Briefly, the Court notes that on February 24, 2000, Lincoln Police Sergeant Michael Garnett and Lancaster County Deputy Sheriff Jeff Bliemeister, went to the home of John Fellers for the purpose of arresting him (Filing No. 23, p. 7:11-15). They knocked

on the door. When defendant responded, they identified themselves and asked if they could come in. The defendant invited the officers in and they all entered the living room of defendant's home. Shortly thereafter, the defendant sat down on the davenport, invited the officers to sit, but they continued to stand. The evidence reflects that the officers then advised the defendant that they were there to discuss his involvement regarding the distribution of methamphetamine, that they had a federal arrest warrant, and that the Grand Jury had indicted him for conspiracy to distribute methamphetamine.

The officers specifically stated that the indictment was regarding his association with persons such as Kathi Kunning, Pat Sardeson, Thomas Geffs, and Mark Farfalla. The evidence is clear that at that point, Mr. Fellers began offering information regarding personal problems which he had during which he admitted he had been using methamphetamine at the time period he associated with these individuals. Other than the foregoing statements by the officers, no further questions were directed at defendant, nor were any specific questions asked of him regarding his use or distribution of methamphetamine. Subsequently, after about fifteen minutes in the defendant's home, the officers took Mr. Fellers into custody and to the Lancaster County jail where he was booked. The officers testified that after he was booked, they, using a written form, advised him of his rights as required by *Miranda*. They asked each question individually, asking Mr. Fellers to respond either "yes" or "no" to each question. At the conclusion of the reading

and advising him of his rights, the defendant and the two officers signed the waiver of *Miranda* rights form (Exhibit No. 1). (See Transcript (Filing No. 21, pp. 16-19)). He thereafter voluntarily gave a statement.

The Court believes that the facts of this case fall squarely within the Supreme Court's holding in *Oregon v. Elstad*, 470 U.S. 298, 84 L.Ed.2d 222, 105 S.Ct. 1285 (1985). In the *Elstad* case, the evidence reflected that the officer had an arrest warrant for Mr. Elstad. When he arrived at the Elstad residence, he sat down with the defendant and asked defendant if he was aware of why he and another detective were there to talk with him. The defendant replied: "No." The officer then asked him if he knew a person by the name of Gross, and the defendant responded: "Yes." The defendant further stated he had heard there was a robbery at the Gross house. At that point, the officer said to Mr. Elstad that he felt that Mr. Elstad was involved in that, and Elstad looked up at the officer and replied: "Yes, I was there." Subsequently, Elstad was escorted to the patrol car, taken to the Sheriff's office and booked. He was then given his *Miranda* warnings, which he indicated he understood, and having those rights in mind, he indicated he wished to speak with the officers.

The trial court let in defendant's written confession. However, the Oregon Court of Appeals reversed the conviction, and the Oregon Supreme Court refused to review. The Oregon Court of Appeals held that the failure to give the defendant his *Miranda* warnings at his home tainted his subsequent written confession, and

accordingly, the Court should have suppressed the use of that confession as evidence. The United States Supreme Court reversed. The Supreme Court noted that the Fifth Amendment prohibits use by the prosecution in its case in chief only of compelled testimony. The Court went on to note that it would be an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, "unaccompanied by any actual coercion or other circumstances, calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process" that a subsequent voluntary and informed waiver is ineffective. The Court then noted:

> Though *Miranda* requires the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

Supra, at p. 309. The Supreme Court further noted:

> We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights.

Id. at 314. The Court concluded:

> We find that the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief. No further purpose is served by importing "taint" to subsequent statements obtained pursuant to a voluntary and knowing waiver.

Id. at 318. In this case, the defendant made a statement at the police station after having been advised of his *Miranda* rights, and the evidence establishes that he made a knowing, intelligent, and voluntary waiver of his *Miranda* rights when he gave his statement to the police. The Court finds the unwarned statements of the defendant made at his home were not coerced so as to taint his subsequent voluntary statement made after he was given the *Miranda* warnings. The Court will adopt the magistrate judge's findings as they relate to the unwarned statements made by defendant at his home but rejects the findings as they relate to the subsequent statement made after he received the *Miranda* warnings.

The Court has reviewed the defendant's objections and finds the foregoing discussion resolves those objections, and they will be denied. The Court will adopt in part and reject in part the magistrate judge's report and recommendation. Accordingly,

IT IS ORDERED:

1) The report and recommendation of the magistrate judge is adopted and rejected in accordance with this memorandum opinion.

2) The unwarned statements made by the defendant at his home prior to his being taken to the Lancaster County Sheriff's Office are suppressed.

3) The statements of the defendant given at the police station after he had received his *Miranda* warnings are admissible.

DATED this 8th day of June, 2000.

BY THE COURT:

LYLE E. STROM, Senior Judge
United States District Court

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN J. FELLERS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ
Of Certiorari

USAP 8th Cir. No. 01-2045

DECLARATION OF MAILING

Comes Now John J. Fellers and submits this Declaration of Mailing in compliance with Supreme Court Rule 29.2 and 28 U.S.C. § 1746. In support of this declaration, Movant states as follows:

1). That I am John J. Fellers the Movant in the above-entitled case.

2). That I am a federal inmate at F.C.I. Pekin.

3). That I placed my Petition for Writ of Certiorari in the F.C.I. legal mail-box on July 29, 2002.

4). Thus, the Petition for Certiorari was timely filed.

5). That a copy of the certified slip that was attached to the Petition for Writ of Certiorari is attached in support of this declaration.

FURTHER DECLARANT SAYETH NOT

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 3 of Sept, 2002

John J. Fellers

John J. Fellers
Reg. No. 16253-047
Federal Correctional
Institution- Pekin
P.O. Box 5000
Pekin, IL 61555-5000

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

RE: Fellers v. United States of America
Petition for Writ of Certiorari

Dear Clerk,

I have enclosed my Petition for Writ of Certiorari to be filed with the Court. Also, I know that the majority of pro se filings are frivolous, but this petition has substantial merit. The ruling of the Eighth Circuit Court of Appeals, in this case, is in conflict with no less than eight decisions of the Supreme Court. I don't mention this to garner any special attention, instead, I wrote this letter to let you know that this pro se petition is not just a source of busy-work. Thank you for your time and consideration in this matter.

Sincerely,

John J. Fellers

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

cc: file
USCA

John J. Fellers
Reg. No. 16253-047
Federal Correctional Institution
P.O. Box 5000
Pekin, IL 61555-5000

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

RE: Fellers v. United States of America
Petition For Writ of Certiorari

Dear Clerk,

I have enclosed my Petition for Writ of Certiorari to be filed with the Court. The letter I received from the Clerk's office stated that I needed to enclose the report and recommendation of the magistrate. However, the report and recommendation was included with the petition. The report and recommendation is in Appendix "D" and Appendix "E". In Appendix "E" is the transcripts of the suppression hearing where the magistrate read his conclusions of law and fact. Later, there was a Memorandum and Order on the Suppression Hearing in which the magistrate referred to the suppression hearing and recommended that the motion to suppress be denied in part and granted in part. This is Appendix "D". Both of these were included in the original petition.

I have also enclosed an affidavit of mailing pursuant to Rule 29.2 because of the missing or illegible postmark.

Thank you for your time and consideration in this matter.

Sincerely,

John J. Fellers

RECEIVED
SEP 11 2002
OFFICE OF THE CLERK
SUPREME COURT, U.S.

APPENDIX "A"

APPENDIX "B"

APPENDIX "C"

APPENDIX "D"

APPENDIX "E"

FILED
U.S. DISTRICT COURT
DISTRICT OF NEBRASKA
00 MAY -2 AM 7:03
GARY D. MCFARLAND
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff,	)	CASE NO. 4:00CR3004
vs.	)	HEARING ON DEFENDANT'S MOTION TO SUPPRESS
JOHN J. FELLERS, Defendant.	)	

Hearing held before the HONORABLE DAVID L. PIESTER, United States Magistrate Judge, on April 20, 2000 in Lincoln, Nebraska.

APPEARANCES:

MS. JAN LIPOVSKY
Attorney at Law
555 South 10th Street
Lincoln, Nebraska 68508-2803 for Plaintiff.

MR. SEAN J. BRENNAN
Attorney at Law
140 North Eighth Street, #340
Lincoln, Nebraska 68508 for Defendant.

April 20, 2000

(Whereupon, the following proceedings took place at 9:00 a.m.:)

THE COURT: Miss Lipovsky.

MS. LIPOVSKY: Thank you, Your Honor. This is a case of United States of American versus John J. Fellers. It's found at Docket 4:00CR3014. I would ask the record to reflect my presence for the United States. Mr. Fellers is present with his counsel.

We are here today regarding the motion to suppress evidence and statements that was filed by Mr. Fellers. I would advise the Court that I have had an opportunity to talk with Mr. Brennan prior to the beginning of this hearing. As the Court's probably aware, in my response I indicated that the Government does not intend to use the guns that were taken from the home and we don't have any problem turning them over to an appropriate person. I spoke with Mr. Brennan about that, and I believe he's agreed to withdraw that part of the suppression motion with that understanding.

THE COURT: Is that correct, Mr. Brennan?

MR. BRENNAN: Yes, that is correct, with the understanding that the Government's statement to the Court that they will not be using the guns as evidence in this case and are willing to turn custody of those

weapons over to a person other than Mr. Fellers, we would withdraw the portion of the motion to suppress that refers to the guns and that the hearing would then proceed on the motion to suppress the statements and not the evidence.

THE COURT: Very well. Do either of you wish to make an opening statement?

Mr. Brennan?

MR. BRENNAN: No, I would waive opening statement.

MS. LIPOVSKY: I would also waive.

THE COURT: All right. And are there witnesses here other than -- who's the first witness?

MS. LIPOVSKY: I have two witnesses that are both outside. Mr. Brennan had indicated he did want a sequestration order.

THE COURT: All right.

MR. BRENNAN: And there are no other witnesses in the courtroom.

THE COURT: All right. If somebody comes in, you can let me know and I'll advise them accordingly.

You can call your first witness.

MS. LIPOVSKY: Thank you.

THE COURT: Please come forward to the clerk's desk to be sworn.

THE CLERK: Please state your full name for the record.

THE WITNESS: Jeff Bliemeister. B-l-i-e-m-e-i-s-t-e-r.

THE CLERK: Please raise your right hand.

Do you solemnly swear or affirm the testimony you are about to give will be the truth to the best of your knowledge and belief?

THE WITNESS: I swear.

THE CLERK: Please have a seat in the witness chair.

JEFF BLIEMEISTER

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. LIPOVSKY:

Q. Please state your business address.

A. 575 South 10th Street in Lincoln.

Q. By whom are you employed?

A. The Lancaster County Sheriff's Office.

Q. And in what capacity are you employed there?

A. I am currently employed as a deputy sheriff and assigned to the Lincoln Lancaster County Narcotics Task Force.

Q. How long have you been a law enforcement officer?

A. Since March of 1996.

Q. And how long have you worked with narcotics?

A. Approximately two years and four months.

Q. What are your general duties as a member of the narcotics task force?

A. I'm assigned to investigate persons involved in the distribution of multiple different kinds of narcotics, both through what we call street enforcement and also through historical cases.

Q. When you work on historical cases, do you obtain and make yourself aware of information obtained from other officers through various sources?

A. Yes.

Q. Do you review reports prepared by them?

A. Yes.

Q. And have you become ever involved with debriefing or proffer interviews of cooperating individuals?

A. Yes, I have.

Q. Do you use that information in assisting you in historical investigations?

A. Yes.

Q. (Coughing) Excuse me. And have you had

training and education to assist you in performing your duties as a law enforcement officer?

A. I have.

Q. Have you been involved in the investigation of John Fellers?

A. Yes.

Q. And is John Fellers present in the courtroom today?

A. He is.

Q. Could you identify him for the Court, please.

A. Mr. Fellers is seated to the right of the defense counsel. He's wearing a striped, lighter colored shirt and blue jeans.

MS. LIPOVSKY: I ask the record reflect the witness has identified the defendant.

THE COURT: It will.

Q. (By Ms. Lipovsky) Deputy Bliemeister, were you involved in contacting Mr. Fellers on February 24th of the year 2000?

A. Yes.

Q. Was that the first time you'd had contact with Mr. Fellers?

A. No.

Q. When did you first meet Mr. Fellers?

A. I believe I first met Mr. Fellers in 1995

while doing volunteer work at Lincoln General Hospital.

Q. And on -- so was this a person that you knew by sight?

A. Yes, it was.

Q. On the 24th of February, then, where did you have contact with Mr. Fellers?

A. At Mr. Fellers' house at 806 Westward Road in Lincoln.

Q. Were you alone or was someone with you?

A. I was accompanied by Sergeant Garnett.

Q. And what was your purpose for you and Sergeant Garnett going to 806 Westward Road?

A. A federal grand jury had returned an indictment for conspiracy to distribute methamphetamine regard - on Mr. Fellers and we went there to arrest him.

Q. Was this an apartment or a residence?

A. It's a home.

Q. Like a single-family residence?

A. Yes.

Q. When you got to this home, how did you make contact with Mr. Fellers?

A. When we walked up, the, what I call, storm door was closed but the - the main front door was open. We knocked on the storm door and waited for Mr. Fellers to come to the door.

Q. Who came to the door?

A. Mr. Fellers did.

Q. And when Mr. Fellers came to the door, what was the first thing that you and Sergeant Garnett did?

A. Acknowledged John and showed him our badge and commission cards identifying ourselves.

Q. At that time were you and Sergeant Garnett in uniform?

A. No.

Q. And at -- when you work with the narcotics task force, do you wear uniforms or plain clothes?

A. Plain clothes.

Q. Did Mr. Fellers appear to be able to identify you?

A. Yes.

Q. After you identified yourself as police officers, what was the next thing that happened?

A. Mr. Fellers -- we asked if we could come inside. He invited us inside. Sergeant Garnett and myself walked in and Mr. Fellers offered us a seat.

Q. Where did you sit?

A. I didn't sit.

Q. And did Sergeant Garnett sit?

A. I don't think so, but I don't remember for sure.

Q. Did Mr. Fellers sit?

A. He did.

Q. What room were you in?

A. I'd describe it as a living room which is the first room off the - the entrance to the residence.

Q. And when you entered into the living room, did Mr. Fellers immediately sit down?

A. Shortly thereafter, yes. I don't know if it was immediately. He walked to the couch and sat down, but it was within a minute or two.

Q. (Coughing) Excuse me. And did you explain to Mr. Fellers why you were there?

A. We did.

Q. What did you tell him?

A. I told Mr. Fellers that we were there to discuss his involvement regarding the distribution of methamphetamine. I then told Mr. Fellers, in fact, we had a federal arrest warrant - or the Grand Jury had returned an indictment regarding him for conspiracy to distribute methamphetamine.

Q. What -- after you told Mr. Fellers that he had been indicted, what did you or Mr. - you say or did Mr. Fellers have a response?

A. I believe I specifically said that this indictment was regarding his association with persons

such as Kathi Kuenning, Pat Sardeson, Thomas Geffs, Mark Farfalla. At that point Mr. Fellers indicated to us that at that point in his life, which I took to mean at the point when he was associated with these persons, he had a lot of personal problems in his life.

Q. Did you begin questioning him about those personal problems?

A. No. Mr. Fellers began to offer us information regarding -- he started talking about how he was going through a divorce. He was having business problems with a former business partner.

Q. Did you ask him questions about his association with Kathi Kuenning?

A. No.

Q. Did you ask him questions about his associations or drug trafficking with Pat Sardeson?

A. No.

Q. Did you ask him any questions in that regard regarding Thomas Geffs?

A. No.

Q. Did you ask him any questions regarding I think it was Mark Farfalla?

A. No, I did not.

Q. Did you - you or Sergeant Garnett ask him any questions when he was talking about his problems, his

personal problems, regarding his drug trafficking?

A. Not regarding his drug trafficking, no.

Q. During the time that Mr. Fellers was - was discussing his - or telling you about his personal problems, was this still going on in the living area?

A. Yes, it was, the living room area.

Q. What did - what did his demeanor appear to be?

A. To me, it was pretty relaxed. Mr. Fellers was seated on the couch in the living room. He was drinking a mug of tea or something like that, water, a large mug that you get at a Kwik Shop. He seemed pretty relaxed, pretty intent on telling us that his problems, during the time period - or during the period that he associated with these people, brought him a lot of grief, I guess I would say.

Q. Did (coughing) - excuse me. Had you also had contact with Mr. Fellers in March of '99?

A. Yes, I did.

Q. Where did that take place?

A. Again, that was at Mr. Fellers' residence at 806 Westward Road.

Q. And have you ever heard the expression "knock and talk"?

A. Yes, I have.

Q. What does that mean?

A. It's a technique that we use regarding multiple aspects of police investigation. It's where we go to a residence -- this one specifically was dealing with a Crime Stopper allegation against Mr. Fellers back then -- we knock on the door, identify ourselves, discuss the allegations that have been made by whoever it is at that point that we're referring to was made by an unknown call to Crime Stoppers and go into it and question Mr. Fellers regarding that.

Q. On that occasion, did he talk to you?

A. Yes, he did.

Q. And did you arrest him after that?

A. No, we did not.

Q. Could you -- or do you recall approximately how long Mr. Fellers talked about his personal problems on February 24th?

A. Not exactly. I would -- my best estimate would be approximately five to ten minutes, somewhere in there.

Q. During that time, did he make any statements regarding drug or narcotics trafficking?

A. Did I?

Q. Did he?

A. He did admit that he had been using - using methamphetamine at the time period when he was associated

with Kathi, with Thomas Geffs, Pat Sardeson.

Q. And was that the statement that you earlier testified to?

A. Yes.

Q. Other than that, did he say anything?

A. Not -- no.

Q. And how did this conversation end?

A. Basically, it ended because, number one, we were pretty busy on that evening. There was a lot of radio traffic going on. We needed to take Mr. Fellers to jail so that we could move on with our day. It was ended by either myself or Sergeant Garnett, I don't know who, saying, John, we need to get going, we need to take you down to jail.

Q. And did Mr. Fellers, then, prepare to go to jail?

A. Yes.

Q. Do you remember how he got to the jail?

A. Yes.

Q. How was that?

A. Sergeant Garnett and I had to transport him in our unmarked police vehicle because there were no marked cruisers available. They were all out of service on other calls.

Q. And you and Sergeant Garnett, were you in the

same vehicle?

A. We were.

Q. During the period after the conversation ended - or after you've indicated - sorry - to Mr. Fellers - or you or Sergeant Garnett indicated that the conversation kind of needed to end because you needed to get on with your day, from that point until Mr. Fellers got into the car did you or Sergeant Garnett question him regarding narcotics trafficking?

A. No.

Q. Did Mr. Fellers continue to talk about his personal life to some extent?

A. He did.

Q. Was there anything in that that you found was related to his activities with the individuals you had earlier mentioned?

A. No.

Q. And during the time that Mr. Fellers was being transported to the jail, did you or Sergeant Garnett question Mr. Fellers?

A. Regarding narcotics? No. And we didn't question him specifically other than when we - when we went down to get his shoes. We questioned him about the guns.

Q. Not about drugs.

A. No, ma'am.

Q. Okay. And when -- again, on the car, was anybody interrogating or questioning Mr. Fellers during the car ride?

A. No.

Q. Was he talking during that ride?

A. He was.

Q. What was he talking about?

A. He was talking about a land dealing that he had, and I don't know if it was a former business partner or what, but it was - basically his involvement with some kind of land dealing that had either gone bad or hadn't turned out the way he wanted it to turn out.

Q. Was Mr. Fellers booked into the prison? Or actually the jail, I guess.

A. Into Lancaster County Jail, yes, he was.

Q. Did you and Sergeant Garnett have an opportunity to talk with him after that?

A. Yes, we did.

Q. Where did that take place?

A. It took place in a room adjacent to the book-in area at Lancaster County Jail, an interview room there.

Q. Who all was present for that?

A. Myself, Sergeant Garnett and Mr. Fellers.

Q. And why were you, Sergeant Garnett and Mr. Fellers in that room?

A. To conduct an interview or attempt to interview Mr. Fellers.

Q. Did Mr. Fellers indicate that he was willing to talk to you?

A. He did.

Q. Are you familiar with the Miranda warnings form?

A. I am.

Q. And what is the purpose of the Miranda warnings form?

A. The purpose is to advise someone that we have in custody that we want to, number one, interview them, but we advise them of their rights to remain silent, to have an attorney present with them during any questioning. And if they cannot afford an attorney, to have one appointed for them prior to any questioning.

Q. Did you advise Mr. Fellers of his rights?

A. Yes.

Q. Did you use a written form to do that?

A. Yes.

Q. And how did you use the written form?

A. I read each question, asking Mr. Fellers to respond yes or no to each question. I then wrote the

response by Mr. Fellers adjacent to each question. I signed it. Mr. Fellers signed it and Sergeant Garnett signed it.

MS. LIPOVSKY: May I approach the witness?

THE COURT: Yes.

Q. (By Ms. Lipovsky) Deputy Bliemeister, I've given you what is marked as Government's Exhibit Number 1. Have you seen that before?

A. Yes.

Q. What is Exhibit Number 1?

A. It is a photocopy of the Miranda warning waiver form that I use - or read to Mr. Fellers.

Q. Is that a true and accurate copy of the original?

A. It is.

Q. Whose handwriting appears on that document following the top until the line that's identified by the number 6?

A. That is my handwriting.

Q. Did you complete it at the time of the interview?

A. I did.

Q. And are there two signatures at the bot -- or actually there are three signatures at the bottom.

A. Yes.

Q. Is one of those yours?
A. Yes.
Q. And did you see Mr. Fellers sign this document?
A. I did.
Q. And does his signature appear on that document also?
A. Yes.
Q. And did you also see - you also see the signature of Mr. - Detective Sergeant Garnett on that?
A. Yes.
MR. LIPOVSKY: I would offer Exhibit 1.
MR. BRENNAN: No objection.
THE COURT: Received.
Q. (By Ms. Lipovsky) Where does Mr. Fellers' signature appear on the document?
A. Under the line premarked subject's signature. It's on the lower right-hand portion of the Miranda form.
Q. And where is your signature?
A. Directly adjacent to that on the line marked "witness."
Q. And can you advise the Court the questions that you asked Mr. Fellers regarding waiving his Miranda rights and his answers?
A. Yes. Would you like me to read them?

Q. Yes.
A. Okay. I want to advise you that I'm a police officer. Do you understand that? I wrote yes. That was Mr. Fellers' response. You have the right to remain silent, not make any statements or answer any of my questions. Do you understand that? Again, I wrote yes. Anything you may say can be and will be used against you in a court of law. Do you understand that? I wrote yes. You have the right to talk to a lawyer and have a lawyer with you during the questioning. Do you understand that? I wrote yes. If you cannot afford a lawyer, you have the right to have a lawyer appointed for you prior to questioning at no cost to you. Do you understand that? I wrote yes. And knowing your rights in this matter, are you willing to answer some questions or make a statement to me now? And, again, I wrote yes, which was Mr. Fellers' response.
Q. Did you proceed to ask Mr. Fellers some questions?
A. I did.
Q. And did Mr. Fellers respond?
A. Yes, he did.
Q. During the time that you were interviewing Mr. Fellers, did anyone else come into the interview?
A. No.

Q. Is one of those yours?

A. Yes.

Q. And did you see Mr. Fellers sign this document?

A. I did.

Q. And does his signature appear on that document also?

A. Yes.

Q. And did you also see - you also see the signature of Mr. - Detective Sergeant Garnett on that?

A. Yes.

MR. LIPOVSKY: I would offer Exhibit 1.

MR. BRENNAN: No objection.

THE COURT: Received.

Q. (By Ms. Lipovsky) Where does Mr. Fellers' signature appear on the document?

A. Under the line premarked subject's signature. It's on the lower right-hand portion of the Miranda form.

Q. And where is your signature?

A. Directly adjacent to that on the line marked "witness."

Q. And can you advise the Court the questions that you asked Mr. Fellers regarding waiving his Miranda rights and his answers?

A. Yes. Would you like me to read them?

Q. Yes.

A. Okay. I want to advise you that I'm a police officer. Do you understand that? I wrote yes. That was Mr. Fellers' response. You have the right to remain silent, not make any statements or answer any of my questions. Do you understand that? Again, I wrote yes. Anything you may say can be and will be used against you in a court of law. Do you understand that? I wrote yes. You have the right to talk to a lawyer and have a lawyer with you during the questioning. Do you understand that? I wrote yes. If you cannot afford a lawyer, you have the right to have a lawyer appointed for you prior to questioning at no cost to you. Do you understand that? I wrote yes. And knowing your rights in this matter, are you willing to answer some questions or make a statement to me now? And, again, I wrote yes, which was Mr. Fellers' response.

Q. Did you proceed to ask Mr. Fellers some questions?

A. I did.

Q. And did Mr. Fellers respond?

A. Yes, he did.

Q. During the time that you were interviewing Mr. Fellers, did anyone else come into the interview?

A. No.

Q. And during the time of this interview, did either you or Detective Garnett leave?

A. No.

Q. (Coughing) Excuse me. At any time did Mr. Fellers request to have an attorney present before answering any questions?

A. He did not.

Q. Did you promise anything to Mr. Fellers in return for him making a statement?

A. No.

Q. Did you make promise, direct or implied, to Mr. Fellers that a confession or admission would result in benefit or advantage to him?

A. No.

Q. Did you coerce or attempt to coerce him into making a statement with threats of force, direct or implied?

A. No.

Q. (Coughing) Excuse me. Did Mr. Fellers appear to understand what you were saying to him when you read him his rights?

A. Yes, he did.

Q. Did Mr. Fellers ever invoke his right to remain silent?

A. He did not.

Q. Did Mr. Fellers' responses during this interview appear to follow the questions that you were asking?

A. Yes.

Q. Did he appear to understand the questions that you were asking?

A. Yes, ma'am.

Q. And did Mr. Fellers appear to freely, voluntarily and intelligently waive his privilege against self-incrimination?

A. Yes.

Q. And did he appear to freely, voluntarily and intelligently waive his right to have an attorney present?

A. Yes, ma'am.

Q. Did -- or do you recall, actually, the questions that you asked Mr. Fellers during this interview?

A. I do.

Q. And can you advise the Court of the questions you asked and his responses.

A. I can.

Q. Could you do that, please.

A. Initially, I began to question Mr. Fellers regarding his involvement with an individual by the name

of Thomas Geffs. Thomas Geffs is also known by Slick; it's a nickname that he goes by. And Mr. Fellers acknowledged that he knew Thomas Geffs by the nickname of Slick. I asked Mr. Fellers if he had ever obtained methamphetamine from Slick and he said that he had not.

I then moved my questioning to a person by the name of Patrick Sardeson. Again, Mr. Fellers said that he knew Patrick Sardeson and also indicated that he had met Thomas Geffs through Patrick Sardeson. I believe, at one point in time, he said that the two had been living together.

I asked Mr. Fellers if he obtained methamphetamine from Pat Sardeson and he said that he had. He specifically indicated that he had obtained gram one-eighth ounce, described them as user quantities of methamphetamine, from Patrick Sardeson.

I asked him if he knew of any of the methamphetamine that he had got from Pat Sardeson had come from Thomas Geffs. He said that on one occasion he believed - he didn't know for sure, but he believed - a gram that he had got from Pat had come from Thomas Geffs.

We then moved our questioning to an individual by the name of Kathi Kuenning.

Q. First, did you ever ask Mr. Fellers if he'd received ounce quantities of methamphetamine from Patrick

Sardeson?

A. Yes, I did.

Q. Okay. And what was his response about that?

A. He had not.

Q. Okay. I'm sorry to interrupt you. You said you asked him questions about Kathi Kuenning?

A. Yes.

Q. And what did you ask him? What was Mr. Fellers' response?

A. Mr. Fellers again said that he had known Kathi Kuenning for a long time. They were personal friends. My questioning specifically dealt with his involvement with Kathi regarding the sale of methamphetamine. He indicated that he had obtained methamphetamine in, again, user quantities from Kathi in the past. I think I specifically questioned him whether or not he had received, again, ounce quantities from Kathi and he said no way had he -- he said that he had obtained gram one-eighth ounce quantities from her but nothing more than that. I asked him if he had ever seen Kathi in possession of additional quantities of methamphetamine and he said that Kathi always had quite a bit of meth on her. I asked him specifically if he had ever seen her in possession of ounce quantities. He said that he had. I would - kind of went up the scale from there asking if he

had ever seen her in possession of quarter-pound quantities. He said no that he had not. But he did indicate that he had seen her in possession of two-ounce quantities of methamphetamine, and I can't specifically remember on how many occasions or if he detailed how many occasions that was on.

At that point, I had previous information I was the person that had done - given the Grand Jury the testimony regarding Mr. Fellers. I knew quite a bit about what people had alleged against him during the proffer interviews I had conducted with him and by reading reports of other officers.

I asked Mr. Fellers if he had been supplying Kathi Kuenning with money to purchase methamphetamine. Mr. Fellers said that he had been supplying money to Kathi but he did not know or did not believe that it was for the - for methamphetamine specifically. In fact, he went on to say that he remembered giving her money on at least one occasion to pay a cellular phone bill that Kathi needed to pay to keep her cell phone on.

I think at that point in the interview we moved on to questioning regarding other persons, one being a Mark Farfalla. Mr. Fellers said that he had known Mark Farfalla for quite some time. He had known his sister, Mark's sister, Shelly Farfalla, who lived in Omaha also.

I asked Mr. Fellers where he had met Mark or how he'd become associated with Mark. And he said while on work release or in prison, I can't remember which one, he had met Mark Farfalla.

I specifically questioned him regarding obtaining methamphetamine from Mark Farfalla.

Q. Did you ask him about obtaining methamphetamine in December of 1998?

A. Yes. That was the time period that I was questioning in regard.

Q. And what was his response?

A. He indicated that -- he went into this story about how he had become reacquainted with Mark Farfalla. He and Kathi had traveled to Omaha, Nebraska and they were at a convenience store or grocery store or something there. And he said it was just a chance meeting that he had run into another old friend of his that was an associate of Mark Farfalla. They began talking about Mark and this friend was either planning on going over to Mark's house or they went to Mark's house. But, in any event, Mark, this friend and Kathi traveled over to Mark Farfalla's residence in Omaha, Nebraska.

I started questioning regarding whether or not that he had made - or got methamphetamine from Mark on this occasion. And Mr. Fellers was pretty evasive about this

question, basically saying that they had used methamphetamine with Mark, with Kathi on this date but whether or not he directly obtained it from Mark, I don't recall him saying that.

I questioned him regarding whether or not Kathi Kuenning had ever been - or he had made the introduction of Kathi Kuenning to Mark Farfalla for the sole purpose of obtaining methamphetamine. John said at this point in time he knew that Kathi was selling methamphetamine. And I believe later -- I'm trying to think exactly how he said it -- in any event, Mr. Fellers basically said that Kathi had obtained methamphetamine from Mark Farfalla later on. But whether or not the introduction by him to Mark - or by Kathi - by John Fellers to Mark Farfalla and Kathi Kuenning, the introduction of those two was specifically for the intent of Kathi to get another source, that information was not fully - it wasn't -- he said it was not that - for that reason.

Q. Did you discuss with Mr. Fellers any phone information that you had linking him and Mark Farfalla?

A. I did.

Q. And what was that conversation?

A. I told Mr. Fellers that I had, through the course of this investigation, I had phone information that I believed connected him to Mark Farfalla and

discussing purchasing narcotics. Again, Mr. Fellers said that at this point in his life, meaning this time period in his life, he was a heavy user of methamphetamine. He had a lot of personal problems. Things were a little bit unclear in his memory. He did say that he believed he may have had a phone contact on one occasion at least and possibly more where he said that they had made reference to obtaining a package of meat. John told me he knew what Mark was talking about. They were talking about obtaining methamphetamine. But when I questioned John further regarding this, he really - he was evasive in his questioning - or evasive in his answers, not wanting to commit one way or another to - whether or not he had obtained methamphetamine directly from Mark Farfalla.

Q. Did you ask Mr. Fellers about fronting money to anyone?

A. I did. Part of this case information that I had previously had - had gone to the Grand Jury with was that basically John was bankrolling Kathi Kuenning, supplying her money. She would make the purchases of methamphetamine from Mark Farfalla, among others, with both his money and money that she had. He, again, said yeah, I loaned Kathi Kuenning some money, specifically bringing up the instance of the cellular phone bill.

I questioned him further regarding this and he

indicated that he had loaned Kathi money on - on more than one occasion. He said that he had bonded her out of jail when she was arrested on State charges for delivery of a controlled substance. He said he had his suspicions about where some of this money was going, but he never asked Kathi. He never got a concrete answer, yes, this was for methamphetamine and I need to pay off a drug debt or I need to get more methamphetamine. He just said he loaned her money. She was a very good friend. One reason was for the phone bill. He had his suspicions that some of this was for narcotics but didn't know for sure.

Q. Did you ask Mr. Fellers any questions about a person whose name is Val?

A. Yes, I did.

Q. What was the question -- what were the questions and what were Mr. Fellers' answers?

A. Val was another person that I knew from previous parts of this investigation, was a source for methamphetamine for Kathi Kuenning after Mark Farfalla had went to prison in early 1999 for possession with intent to distribute methamphetamine. I told -- I asked if he had ever met Val, who I knew to be a source from a proffer interview conducted with multiple persons in this case. He said he didn't think that he had. Maybe on one

occasion he had met her. I asked if he had ever got methamphetamine directly from Val. He said that he had not.

Q. And, I'm sorry, did you already say who Val actually was, if you were able to identify who Val was?

A. Val -- I know Val's last name. Her name is Valerie Green. She liv -- at that point in time, she resided in Omaha. We have never had -- we haven't had any direct contact with Val as part of this investigation, only through -- we've identified her through Kathi Kuenning's testimony and also through analysis of cellular tolls.

Q. Did -- were you present when Detective Sergeant Garnett asked any questions of Mr. Fellers?

A. Yes, I was.

Q. Do you recall what was asked and Mr. Fellers' response?

A. Yes. Sergeant Garnett began questioning and John had indicated to us on multiple different points during this interview that he was a heavy user. Sergeant Garnett basically asked him about his use, how it started, how he used and believe he initially began -- I can't say for sure; I don't remember how he initially began using it. But at some point in time, he began smoking methamphetamine on tin foil. Later, he said that

Kathi Kuenning had shown him how to bang - or to inject methamphetamine into the blood stream, and he said that that's how his use had progressed from smoking to now injecting. And he indicated that at some points during the time period when he was dealing with Kathi, he was injecting at least a quarter gram at a time.

Q. Did Mr. Fellers make some more comments about his personal and business problems at that point?

A. Yeah. Again, that was kind of hit and miss throughout this interview where Mr. Fellers was talking about his problems with his ex-wife, his problems of his ex-business partner.

Q. Um, how did you respond to Mr. Fellers' statements during this after he'd been telling you this information?

A. Just -- from based upon extensive research that I had done in this investigation, all the different interviews and Mr. Fellers' statements to this point, you know, I thought that Mr. Fellers was - was telling us about half the story, you know. I didn't -- in my mind, I did not believe that Mr. Fellers could be fronting all this money to Kathi. Kathi would show him these additional quantities of methamphetamine. He knew that she was getting it from Mark Farfalla and I just didn't believe that his involvement had - had stated that based

upon his information that he'd given me and then all the other interviews that I had done. I told John this: that I believed he was splitting hairs, that he wasn't being a hundred percent truthful, that he was, you know, on the right road, but not - not completely coming forth.

Q. Did you continue to - the interview at that point?

A. There may have been some more interview regarding the fronting of the money to Kathi Kuenning, the borrowing of the money, trying to actually delineate exactly what the money was for, how much money it was, but at some point, this was pretty much the end of the interview.

Q. That additional information, was it basically reflective of what he'd already told you and what you've already testified to?

A. Yes, ma'am.

Q. Did you ever ask Mr. Fellers again if he sold methamphetamine to Patrick Sardeson?

A. I did.

Q. And what did he say?

A. He said he'd never sold it to him.

Q. Did you ask him if he ever shared it with him?

A. I did.

Q. And what did he say?

A. He said he had shared methamphetamine with friends and Patrick Sardeson was one of those people he'd shared methamphetamine with.

Q. Did the name Leon Thompson come up?

A. Yes.

Q. And what did Mr. Fellers say about Leon Thompson?

A. Leon Thompson, another person I knew associated with this investigation, I brought Leon Thompson's name up to Mr. Fellers. Mr. Fellers said, yeah, I know Leon, he's a friend. Asked him if he had sold methamphetamine to Leon. He said he'd never sold. He said that he had shared methamphetamine with Leon.

Q. Did Ernest Lawrence come up?

A. Yes.

Q. How did that happen?

A. Mr. Lawrence was a person that I had interviewed during this case during a proffer interview. I had infor - had information that John had possibly sold him methamphetamine on one occasion so I asked John if he'd ever sold methamphetamine to Ernie Lawrence. He said that he had not.

Q. Was there -- were there any other questions that were asked of Mr. Fellers that - specifically regarding narcotics that you recall at this time?

A. Not anything more specific than what I've just testified to.

Q. Was there any other information that he provided that you recall at this time that you've not already testified to?

A. No.

Q. At the end of the interview, then, what did you and Sergeant Garnett do?

A. At the end of the interview, as we always do in interviews such as these, or at least I always do, I told John about the charges that he was facing. I told him that he would be brought in front of a magistrate and that his release or conditional release would be based upon that appearance. I told John if he'd be appointed counsel or he'd - he would have to buy or pay for counsel. And I told him that if he did not believe that he was involved in the distribution of methamphetamine to let his attorney know this and that - to take this case to court. I did tell him, though, that if he felt that his involvement was more or he felt his involvement in the distribution of methamphetamine was significant, that he should disclose this a hundred percent to his defense attorney and that we would be interested in doing what is called a proffer interview with Mr. Fellers, then explained what a proffer interview was.

Q. Did that finish the interview that you had with Mr. Fellers on that date?

A. It did. I guess to clarify that it finished the interview in that room, brought Mr. Fellers back out to the booking area. I told John that I wasn't going to book him in on these firearms that we had found in his residence at this time. And he all -- basically, there was some conversation that if the county attorney chose not to prosecute, he would like to have these turned over to his family in Lexington, Nebraska.

Q. Did all this occur in Lincoln, Nebraska?

A. It did.

MS. LIPOVSKY: I don't have any other questions.

THE COURT: Cross-examination?

MR. BRENNAN: Thank you.

CROSS-EXAMINATION

BY MR. BRENNAN:

Q. You indicated that you first met Mr. Fellers in 1995 when you were doing volunteer work at Lincoln General Hospital?

A. That is correct.

Q. Were you both doing volunteer work at that time?

A. Yes.

Q. And how well acquainted did you get with him then?

A. I can only specifically remember meeting him on one occasion.

Q. What type of volunteer work was this?

A. Well, it was in the intensive care unit of Lincoln General Hospital, BryanLGH West, I guess, now, kind of a family liaison type of thing for critical care patients up there.

Q. And when you had your next meeting with him in March of 1999, did you recognize him at that time from that previous occasion at Lincoln General?

A. I did, yes.

Q. Did you --

A. I had also seen pictures prior to contacting John and recognized, yeah, this is the same person.

Q. Okay. And did you mention that to him? Did you talk about your previous acquaintanceship?

A. I think that I did in March of 1999. I think I remember talking to him and telling him that I had met him up there.

Q. And your contact with him in March of 1999, that was specifically on March 11, 1999?

A. I believe -- I'd have to review the ACI to say it was exactly that date.

Q. Okay. You generated an additional case information report as a result of that contact?

A. I didn't, no.

Q. But there was one prepared by another officer?

A. Yes, there was.

Q. That would have the date that you got the Crime Stopper call and the date that you had the contact?

A. Yes, it would.

MR. BRENNAN: May I approach the witness, please?

THE COURT: Yes.

Q. (By Mr. Brennan) I'm showing you a document that's captioned "Lincoln Police Additional Case Information." Is that correct?

A. It is.

Q. And is that the ACI that you referred to concerning the March '99 contact?

A. It is.

Q. And does it indicate that the Crime Stopper call came in on December 12, 1998?

A. Yes.

Q. And that surveillance was conducted on Mr. Fellers' residence on that date?

A. Surveillance was conducted on the 28th of 1998 and the 16th of January, 1999.

Q. And then later on March 11, 1999 you actually contacted him and spoke with him.

A. That is correct.

Q. On that March 11, 1999 occasion were you dressed in plain clothes the way you were when you talked with him in February of 199 - 2000?

A. A similar dress, yes.

Q. And did you arrive at his residence in an unmarked vehicle on that occasion?

A. Yes.

Q. Were you alone?

A. No.

Q. So you were with another officer, a Lincoln police officer?

A. Yes, I was.

Q. That was Officer Dalton?

A. Correct.

Q. And he was also dressed in plain clothes?

A. He was.

Q. And you knocked on the door on that occasion?

A. Yes.

Q. And Mr. Fellers answered the door?

A. Yes.

Q. And you showed him your badge and your commission card?

A. That is correct, sir.

Q. And so did Officer Dalton?

A. Yes.

Q. And you told him that you were there to talk to him about drug activity?

A. The investigator -- it was Investigator Dalton's case; it was assigned to him. The majority of the talking initially was done by Investigator Dalton.

Q. And what Investigator Dalton told him was is that they - that you had this report that he'd been involved in some drug activity?

A. That is correct.

Q. And that that's what that - you were there to talk to him about?

A. Yes, sir.

Q. And you asked him if he would agree to talk to you?

A. Basically. I don't know if that specific words were mentioned. We got - we do these Crime Stopper things all the time. We indicate that the allegations are made to Crime Stoppers by an unknown caller, not by the Lincoln Police Department, and told him that we wanted to discuss these allegations with him basically.

Q. And to search his residence?

A. We did ask consent - or Investigator Dalton

asked consent to search his residence, that is, yes.

Q. And he allowed you to search his residence?

A. He did.

Q. And he answered your questions?

A. He did.

Q. And there was no evidence found during the search?

A. No, sir.

Q. And how long did that contact last?

A. I really can't remember for sure. It's a long time ago.

Q. What does -- what would you estimate that would have taken?

A. Half hour or less.

Q. But when you contacted him again, the last time, that was February 24, 2000.

A. Yes, sir.

Q. And you went to his residence with a Lincoln police officer, and each of you were dressed in plain clothes?

A. Yes.

Q. Driving an unmarked vehicle.

A. Yes.

Q. And you knocked on the door again.

A. Yes, sir.

Q. And Mr. Fellers answered the door.

A. Yes.

Q. You again showed him your badges and your cards, the way you had done previously?

A. Yes.

Q. Except this time you told him that you had a federal warrant for his arrest.

A. That is correct, sir.

Q. And the first thing you told him was that you needed to discuss with him his involvement in the use and distribution of methamphetamine.

A. That is correct.

Q. And then the very next statement you made to him was that he'd been indicted by a federal grand jury, that you had a warrant for his arrest and that you were there to arrest him.

A. That's the general context of that, yes, sir.

Q. So it's clear that that was the ultimate purpose of going there was to arrest him.

A. That was the purpose.

Q. And it's clear that that was what you made a point of telling him when you began your conversation with him.

A. Yes, sir.

Q. And at that time did you advise him of his

right to remain to silent?

A. No, sir.

Q. And at that time did you advise him of his right to have an attorney present during questioning?

A. I did not.

Q. And in response to your comment of wanting to discuss his use - his involvement in the use and distribution of methamphetamine, he sat down and asked you what you wanted to talk about.

A. No, not specifically. He did sit down - he did sit down at some point, yes.

Q. And he offered you a seat.

A. He did.

Q. To discuss whatever you needed to discuss.

A. That is correct.

Q. And that's when you told him that you wanted to talk to him about Kathi Kuenning, Mark Farfalla, Patrick Sardeson and Thomas Geffs.

A. After I had told him that we had a federal indictment for his arrest regarding his involvement with the people that you have just mentioned, sir.

Q. Okay. And that you wanted to talk to him about his involvement with those people.

A. I guess, could you clarify the question a little bit further?

Q. He asked you to sit down to discuss whatever you wanted to discuss.

A. Yes.

Q. He sat and you didn't.

A. That is correct.

Q. You told him you wanted to discuss his involvement in the use and distribution of methamphetamine as it pertained to his acquaintanceship with Kathi Kuenning, Mark Farfalla, Patrick Sardeson and Thomas Geffs.

A. Yes.

Q. And he indicated to you that he knew those people.

A. He did.

Q. Well, you didn't go person by person, but in general he responded that he knew who you were talking about.

A. I took it to mean that because he responded by saying at that point in my life, meaning when he was associated with these people -- and, like I told Miss Lipovsky, that's when he started talking about a lot of personal problems in his life.

Q. And at that time did he identify Thomas Geffs by that name or did he refer to him as somebody named Slick?

A. I think he referred to him as Slick.

Q. And did you refer to that person as Slick as well?

A. I said Slick is Thomas Geffs.

Q. And was this conversation that you had with him there at his residence tape recorded?

A. No, it was not.

Q. And at that time the statements that he made to you amounted to using methamphetamine?

A. Not only -- he was talking about how his life was in disarray, I guess is the general consensus of what I took. Included in that, not only with his problems with his ex-wife, his business partner, was that he was using methamphetamine, yes.

Q. But not involved in the distribution of it.

A. No. In fact, to the best of my recollection, there was no conversation about his distribution of methamphetamine.

Q. And at that time, you indicated that he was drinking something from a mug.

A. Yes.

Q. Do you know what it was?

A. I don't know for sure.

Q. Did you ever look in the mug to see what it was?

A. No.

Q. And you arrived at the residence and knocked on the door at 1624 hours?

A. Yes.

Q. And you left the residence to take him to the jail at 1639 hours?

A. I'd have to refer to my report specifically, but it does - that time does sound right.

Q. So the time you spent with him there at the house before leaving was 15 minutes.

A. Roughly, yes.

Q. During the time that -- what type of car was it that you had?

A. We switch cars a lot.

Q. Do you remember?

MS. LIPOVSKY: Objection. Relevance as to specifics.

THE COURT: Sustained.

Q. (By Mr. Brennan) During the time that you were in whatever car you were in, was - were either you or Detective Garnett in possession of a tape recorder?

A. No.

Q. Is there any tape recording that you're aware of of the conversation in the car?

A. No, sir.

Q. Do you remember what time you arrived at the jail?

A. I can testify to the time that we read him Miranda, but exactly what time we arrived at the jail, it would have been in the near vicinity of 5 o'clock, not -- I can't say to the minute, sir.

Q. And when you say 5 o'clock, you're referring to 5 o'clock in the afternoon.

A. Yes, sir.

Q. Did you book him into the jail before the interview?

A. By booking -- what do you specifically mean by booking him in, sir?

Q. What do you mean when you say booking?

A. When I say booking, I mean thumbprints, photographs, the whole process. All that had not been done. We had brought Mr. Fellers out, I typically do, any arrest that I do whether it's for whatever, is I bring him up, have him stand in front of the main booking area desk and tell the jailers who he is so they can start the paperwork process. I know that he had not been photographed or fingerprinted before we talked to him, but his presence was made known to the jailers.

Q. At that time, did someone search him and take his property from him and --

A. Yeah, in the general context of all that, but, again, whether or not -- I know the people who are lodged on narcotic warrants are strip searched as a matter of practice by the jail. Now, whether or not Mr. Fellers was strip searched before we talked to him or after we talked to him and whether all of his property had been removed, I cannot remember.

Q. How long did the jail interview take?

A. I would say approximately a half hour from the time that we read the Miranda form to John until he was turned back over to the jail staff and we left.

Q. And that occurred in an interview room right off to one of the sides of the booking desk?

A. Yes, sir.

Q. Do you remember which room it was?

A. I do not. There's three rooms there.

Q. Was that interview date recorded?

A. It was not.

Q. At that time, were either you or Detective Garnett in possession of a tape recorder?

A. We were not.

Q. And during that jail interview, the same names that you mentioned to him at his house were brought up.

A. Yes. Those are the names of the people that had - brought to the Grand Jury that I had known about

who I had interviewed, yes, they were.

Q. And they were brought up in the context of Mr. Fellers' knowledge of them and association with them.

A. At which point, sir?

Q. During the jail interview.

A. Okay. Yes, they were.

Q. And specifically in connection with Mr. Fellers' use and/or distribution of methamphetamine.

A. Yes.

Q. And during your previous testimony, the only names that I gather weren't mentioned at the house were the names of Valerie Green and Leon Thompson; is that right?

A. No, there were others. Shelly Farfalla.

Q. Okay. He indicated he knew -- when you were asking him about Mark Farfalla, he said he knew Mark and his sister Shelly?

A. That is correct.

Q. Okay. But the names that you brought up -- you didn't bring up Shelly's name; Mr. Fellers did that.

A. Yes.

Q. The names that you brought up that you didn't mention to him while you were at his house were Valerie Green and Leon Thompson.

A. Yes.

Q. During your interview with him, he never used the word "fronting" money, did he? He said he loaned money.

A. That is correct.

Q. So the word "fronting" were - those were words that you were using here today or using then but those weren't his words.

A. Those were my words that I used then and today, yes.

MR. BRENNAN: No further questions.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MS. LIPOVSKY:

Q. When did the name Ernie Lawrence first come up?

A. At the jail.

Q. So that was another name that came up there but not at the house?

A. Yes.

Q. (Coughing) Excuse me. Um, when you contacted Mr. Fellers at his home and he invited you in, did you begin to interrogate him regarding his association with narcotics and narcotics trafficking?

A. No.

Q. When Mr. Fellers was seated in his living

room, where were you and Detective Garnett standing in relation to him?

A. Where Garnett - or Detective Garnett was standing, I can't specifically remember. I remember standing -- Mr. Fellers was seated on the couch. There was a coffee table or some type of table in the living room, and I was on the other side of that table facing Mr. Fellers.

Q. Was Detective Sergeant Garnett standing directly next to Mr. Fellers?

A. No.

Q. Was there a space, then, between you, Detective Sergeant Garnett and Mr. Fellers?

A. Yes.

Q. During the time that you were at Mr. Fellers' house, did he appear to be intoxicated?

A. No.

Q. During the time that you were transporting him and talking to him in the jail, did he appear to be intoxicated?

A. No.

Q. Did you smell any alcohol or anything that would indicate that he had been drinking anything other than a simple non-alcoholic beverage at his home?

A. I smelled no odor of alcoholic beverage and no

signs that Mr. Fellers was intoxicated.

MS. LIPOVSKY: I don't have any more questions.

EXAMINATION

BY THE COURT:

Q. Sir, when you arrived at the residence, it's my understanding from your earlier testimony that your first comment to the defendant was that you wanted to discuss his dealings with methamphetamine; is that correct?

A. That is correct, sir.

Q. Your second comment to him was advising him that he was under arrest - or you had a warrant for his arrest?

A. Yes, sir.

Q. All right. And your third comment was that the indictment returned by the Grand Jury had to do with his involvement with certain individuals; is that right?

A. Yes. As I remember it specifically when we entered we asked him the first statement and then the next was just kind of a, you know, a continuation. In fact, I remember - in fact, the Grand Jury returned an indictment for conspiracy to distribute methamphetamine regarding your involvement with the people that I've named: Kathi Kuenning, Pat Sardeson, Mark Farfalla and

Thomas Geffs.

Q. All right. When you -- in the normal course of your dealings as a narcotics agent, when you arrest someone, do you advise them of the specific background of the charges?

A. In these cases, the federal cases, the lengthy ones, yes, I do. Regarding who it is involved with, yes.

Q. Why is that?

A. Specifically, it's just part of what - the whole speech that I give them.

Q. Is it part of your training to give them that speech?

A. No, not part of my training, sir.

Q. When you mentioned names to the defendant at his home that day, did you expect that he would respond?

A. No. I expected that he -- this was a long time ago. This was back in 1998. It had been almost two years prior and that was part of why I said his involvement with these persons. Most of these persons had been incarcerated for a considerable amount of time. And, in fact, people in conspiracy - historical conspiracy cases, when we contact them, you know, they always think that it's something that's happened right now. And it's not. It's things that have happened in the past.

Q. Were you surprised that he made comments in response to your comment?

A. No.

Q. Tell me again, if you will, the persons that you talked about at the jail that had not been talked about at the home.

A. Valerie Green, Leon Thompson and Ernie Lawrence and also Shelly Farfalla.

Q. As I recall your testimony, you also stated that you did not talk about fronting money at the home, but you did talk about it in the jail interview; is that correct?

A. That is correct.

Q. Were there other subjects that you talked about in the jail interview that you did not talk about at the home?

A. Yes.

Q. What were those?

A. Specifically, Mr. Fellers' involvement in the distribution of methamphetamine. And then I specifically made reference using what I knew previously through the case to question him about each specific person that I had mentioned.

Q. Was there some reason, back at the home again, that you did not sit down when he invited you to sit?

A. Yes.

Q. And what was that?

A. Often, we're invited to sit down. For officer safety reasons, I never sit down in a house. That is part of my training. Just never do it.

Q. Is that the only reason?

A. That is the only --

Q. Officer safety?

A. That is the only reason, sir.

Q. Did your training ever concern the psychological effect of talking to someone while you're standing and they're sitting?

A. Yes, I have had training regarding that.

Q. Was that also part of the reason that you didn't sit down?

A. It wasn't, sir.

Q. I take it at the time of the home interview that the defendant was not free to get up and move around at his leisure; is that correct?

A. No, sir.

Q. No, it's not correct --

A. No, this is --

Q. -- or no, he wasn't?

A. He wasn't. He wasn't free.

Q. All right. So if he'd done that, you would

have restricted his movement; is that right?

A. Yes. There was some things that happened after the fact that -- he asked to get his shoes.

Q. Yes.

A. Okay. Yes, that is correct.

Q. All right. I guess I'd better have you amplify on that, the fact that at the conclusion Detective Garnett advised him that it was time to go; is that right?

A. I can't say for sure if it was Detective Garnett or I, but we both came to the understanding that yes, it was time to go. I can't remember specifically who said, John, it's time to go, let's wrap --

Q. Okay. And so then what happened?

A. He said, can I get my shoes? And Mr. Fellers had been, you know, laid back, cooperative to this point. He had -- and I said, sure. He said, my shoes are downstairs. I said, John, you're under arrest. Wherever you go in the house, I need to go also. And while walking down the stairs, I made a comment, again, for officer safety, you don't have any guns in the house, do you? And that's how it was said. You don't have any guns in the house.

Q. All right. But in any event, the reason that you were with him was because he was under arrest; is

that correct?

A. Yes, sir.

Q. All right. That's all the questions that I have.

THE COURT: Are there questions on my questions?

Miss Lipovsky.

MS. LIPOVSKY: Thank you, Your Honor.

FURTHER REDIRECT EXAMINATION

BY MS. LIPOVSKY:

Q. Regarding sitting and standing, was Mr. Fellers told he had to sit down?

A. No.

Q. Was he free to stand?

A. Yes, sir - or yes, ma'am.

Q. Whose decision was it that Mr. Fellers sat?

A. That was Mr. Fellers' decision.

Q. And did you place yourself while you were standing in a proximity to Mr. Fellers that would have been close enough to intimidate?

A. No.

Q. When you were standing, was your intent to intimidate Mr. Fellers into talking to you?

A. It was not.

Q. And did your position seem consistent with the

training that you had received regarding the psychological impact of standing while talking to a seated person?

A. No.

Q. It wasn't consistent with that?

A. Where I was standing?

Q. Yes.

A. It was not consistent with the training I received regarding the psychological interviewing of subjects.

Q. I want to clarify that, if you can, because I think I asked the question very poorly.

A. Well, basically, what we're taught in situations such as that, and it's not so much specifically that I've been taught about a standing or a sitting suspect. It's when conducting an interrogation of a suspect, the way that you are seated adjacent to them and that is the - interrogation goes on of slowly moving in in closer proximity to that person as you're interviewing as part of the psychological effects of that. But I maintained my distance from Mr. Fellers when I was standing. I just don't sit down in somebody that's we're going to arrest's house.

Q. Did you change your position while Mr. Fellers was talking about his personal problems and going on

about that?

A. I did not.

Q. Did Mr. Fellers' demeanor change in the area, the difference in his relaxed state?

A. No.

Q. And, if I could clarify, when you were answering the judge's questions, the first comment that was made was that you were there regarding his involvement with methamphetamine. And then the way I understood you answered, it was that kind of the fact you had a warrant and who it was about. Was that all one kind of continuous statement or was there a break there? Do you recall?

A. As I recall saying, you know, I came in, I made the statement, John, I'm here to discuss your involvement in the distribution of methamphetamine. In fact, the Grand Jury has returned an indictment regarding your involvement with those people that I mentioned. That was just a continuous kind of - or a statement that I made.

Q. And you say here today, "those people that I mentioned." At that point, was it the first time you brought up those names?

A. Yes, that was the first.

Q. And then following that, did you say to Mr.

Fellers, you have to answer our questions?

A. No, ma'am.

Q. Did you begin asking him specific questions?

A. No, ma'am.

Q. Did Mr. Fellers just kind of make a comment about that was a long time ago and all these problems?

A. Exactly.

Q. And after that, did you again at the home question him about those people specifically?

A. No, never at the home.

Q. Did Mr. Fellers continue to make statements about his personal problems?

A. He did.

Q. Did any of those things, those statements that he made, have anything to do with those individuals and narcotics trafficking?

A. No.

Q. Other than the one comment about --

A. Other than that he was using at the time period that he was dealing with these people.

Q. While Mr. Fellers was talking to you, was he handcuffed?

A. No.

Q. Physically restrained?

A. No.

Q. Asked questions designed to elicit incriminating responses?

A. No, ma'am.

Q. And when he finally was going to be removed from the home, the restriction on him was simply that he had to have a chaperon, for lack of a better word.

A. When we went down to get his shoes; is that --

Q. Yes.

A. Yes.

Q. And there wasn't any other time when he was physically restrained from going anywhere, was he?

A. No.

MS. LIPOVSKY: I don't have any more questions.

THE COURT: All right. Mr. Brennan.

MR. BRENNAN: Thank you.

FURTHER CROSS-EXAMINATION

BY MR. BRENNAN:

Q. The room that you're in, it's a living room at the house.

A. Yes.

Q. And what are -- what's the size of the room, in your estimation in feet?

A. I'm not real good at that. I suppose not quite as big from wall to wall as this - from the jury -

from the end of the jury wall to this wall, not that big. I'm not real good at estimating size and feet.

Q. You're saying that it's not as wide or as long?

A. I'm talking as wide, as from the end of the jury box to this wall, it's less wide than that, I think, but pretty close, pretty similar.

Q. Maybe from the far corner of the bailiff's - or the courtroom deputy's desk to where you're sitting?

A. To the end of where I'm sitting, yes.

Q. Four-and-a-half strides?

MS. LIPOVSKY: Well, I guess I'll object to the form of that question. A stride.

THE COURT: Sustained. Let's go back to feet.

MR. BRENNAN: May I?

THE COURT: Yes.

Q. (By Mr. Brennan) From about where I'm standing here to the corner of the witness stand that you're sitting in?

A. I'd say to this wall.

Q. And you can't tell us approximately how many feet that is?

A. Sir, this is the second time I've been in Mr. Fellers' home. I could not tell you the size of my living room in my home. It's just nothing that I've

ever --

Q. He was seated in a chair or on a couch?

A. On a couch.

Q. And there was a coffee table in front of the couch?

A. Yes.

Q. And you were standing on the other side of the coffee table.

A. Yes, sir.

Q. Within a few feet.

A. Yes.

Q. And Detective Garnett was standing beside you.

A. I can't say if he's directly beside me. I, you know, have to ask Detective Garnett exactly where he was standing.

Q. And you were each armed with service weapons.

A. We were.

Q. And you're not trained when you make an arrest to say, "we're here to discuss" or to preface your remarks with that phrase; is that right?

A. That is correct.

Q. But that's what you did in this case.

A. That is.

MR. BRENNAN: That's all.

THE COURT: All right. You may step down.

MS. LIPOVSKY: Your Honor, I have one other question about something that wasn't brought up before that Mr. Brennan asked.

THE COURT: What was that?

MS. LIPOVSKY: About the service weapons.

THE COURT: Go ahead.

FURTHER REDIRECT EXAMINATION

BY MS. LIPOVSKY:

Q. Did you have your service weapons drawn?

A. No.

Q. Were they visible at that time?

A. They were not.

Q. Thank you.

THE COURT: Anything on that?

MR. BRENNAN: No.

THE COURT: All right. You may step down.

MS. LIPOVSKY: I have one other witness. Do you want me to call him now?

THE COURT: Let's take a quick break. We'll be in recess for ten minutes and resume at the same spot.

* * * * * *

Whereupon, after a ten-minute recess, the following proceedings were had:)

THE COURT: You may call your next witness.

MR. LIPOVSKY: Thank you. And I forgot to ask, Your Honor, if the other witness could be excused.

MR. BRENNAN: No objection.

THE COURT: All right. Yes, he may.

Please come forward to the clerk's desk to be sworn.

THE CLERK: Please state your full name for the record.

THE WITNESS: Michael A. Garnett, G-a-r-n-e-t-t.

THE CLERK: Sorry, could you respell the last name.

THE WITNESS: G-a-r-n-e-t-t.

THE CLERK: Please raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth to the best of your knowledge and belief?

THE WITNESS: I do.

THE CLERK: Please have a seat in the witness chair.

THE COURT: Go ahead.

MICHAEL A. GARNETT

having been first duly sworn,
testified as follows:

DIRECT EXAMINATION

BY MS. LIPOVSKY:

Q. What is your business address?

A. It's 575 South 10th Street now, I believe, Lincoln, Nebraska.

Q. And by whom are you employed?

A. The City of Lincoln for the police department.

Q. And in what capacity are you employed there?

A. I'm a detective sergeant assigned to the narcotics unit.

Q. How long have you been a law enforcement officer?

A. Twenty-six years.

Q. And how long have you worked with the narcotics division?

A. Approximately 18 years.

Q. What are your general duties there?

A. I'm a supervisor of - responsible for the supervision of the plain clothes investigators assigned to the unit which would cover the assignment of cases, assisting those officers in working those cases. I also handle personnel matters that relate to those officers. In addition to that, I conduct investigations and carry a caseload of my own.

Q. Do you review other reports prepared by other

officers?

A. Yes, I do.

Q. So you work historical cases on occasion?

A. That's almost all I do, yes.

Q. And were you aware of an investigation concerning John Fellers?

A. Yes, ma'am.

Q. Is John Fellers present in the courtroom today?

A. Yes, he is.

Q. Could you identify him for the Court, please.

A. Yes. He's seated at defense counsel table. He's got on light colored blue jeans and a plaid, tan colored shirt.

MS. LIPOVSKY: I'd ask the record to reflect the witness has identified the defendant.

THE COURT: Yes, it will.

MS. LIPOVSKY: Thank you.

Q. (By Ms. Lipovsky) Detective Garnett, did you have contact with John Fellers on February 24th of the year 2000?

A. Yes, I did.

Q. Where did that contact take place?

A. At his residence in Lincoln, Nebraska.

Q. And is that at 806 Westward Road?

A. Yes.

Q. Who was with you at that time?

A. Deputy Jeff Bliemeister.

Q. Is he also a member of the narcotics task force?

A. Yes, he is.

Q. When you went to the residence on that occasion, were you in uniform or plain clothes?

A. Plain clothes.

Q. Did you and Deputy Bliemeister knock on the door?

A. Yes, we did.

Q. And who answered the door?

A. Mr. Fellers.

Q. Did you and the deputy identify yourself as law enforcement officers?

A. Yes, we did.

Q. How did you do that?

A. I don't recall exactly what Deputy Bliemeister said. I identified myself as Detective Garnett and there was - Deputy Bliemeister had contacted Mr. Fellers on a previous contact and identified himself or said something about, I'm Deputy Bliemeister, do you remember me from before or something, words similar to that effect.

Q. What was Mr. Fellers' reaction?

A. He indicated that he recognized and remembered Deputy Bliemeister.

Q. Did he indicate if he remembered you?

A. Yes, he did.

Q. Had you had previous contact with him?

A. Yes, I had.

Q. And did you recognize Mr. Fellers when you saw him?

A. Yes, I did.

Q. After Mr. Fellers answered the door, what happened?

A. He invited us into the residence. We stepped inside. And at that time Deputy Bliemeister told Mr. Fellers that there were some things that we needed to talk about and went on to explain to Mr. Fellers that an indictment charging Mr. Fellers with conspiracy to deliver methamphetamine had been returned by the Grand Jury. At that time, Deputy Bliemeister also listed off the names of some people - other people who were also involved in that indictment.

Q. At that time, were all of you standing?

A. I believe at that time we were still all standing, yes. There was a --

Q. Did that --

A. I'm sorry.

Q. Did that change?

A. Yes, it did.

Q. How did it change?

A. After we -- as we stepped into the entryway into the residence, then that leads right into the living room. At some point in time, Mr. Fellers had a seat on a either a couch or a loveseat that was in the residence.

Q. Was he directed to sit down?

A. No, he was not.

Q. When he sat down, what did he say to you or Deputy Bliemeister about whether you could be seated?

A. I don't - I don't remember that there was any conversation about whether we could have a seat or not. I don't recall if there was or not.

Q. Where did you position yourself in relation to Mr. Fellers?

A. In the - in the close proximity. We were in the living room. Or I guess I would refer to it as a living room, just a few feet away from this couch or loveseat that he was seated on.

Q. Was this position one that you picked for a specific reason?

A. No.

Q. Was it within arm's length distance of Mr. Fellers?

A. No, it was not.

Q. Nearer or farther?

A. It was further away than that.

Q. Okay. During the contact with Mr. Fellers in the living room, did you and Deputy Bliemeister stay in the same positions?

A. Yes, I believe we did. I don't think anybody moved around at all.

Q. Was your position one of - in an attempt to intimidate Mr. Fellers?

A. No, it was not.

Q. After Deputy Bliemeister had listed the individuals that it was reported Mr. Fellers had been involved with, what was Mr. Fellers' response?

A. Mr. Fellers indicated to us that there had been a point in time in his life where there had been some personal problems, problems that involved an ex-wife, problems that involved the business that he owned and during that time Mr. Fellers indicated that he had used methamphetamine during that time.

Q. Did you ask any questions directly of Mr. Fellers during the time you were in the living room?

A. This conversation regarding the personal problems lasted for several minutes and I recall, at least at one point when he was talking about the

business, I believe I asked him who his business partner was or something to do with the problems associated with the business.

Q. Did that have anything to do with narcotics trafficking?

A. No, it did not.

Q. And did you ask any questions of Mr. Fellers during this time in the living room that was specifically designed to elicit an incriminating response?

A. No, I did not.

Q. Did you interrogate him regarding the individuals that had been mentioned in narcotics trafficking?

A. No, ma'am.

Q. Did you ask him any other questions?

A. When we were preparing to leave and when we had explained to Mr. Fellers that we needed to leave, there was some conversation regarding he needed to get some shoes.

Q. Between the time that you entered and that conversation, were there other questions you were asking Mr. Fellers?

A. I don't remember any other questions, no.

Q. Was there any information he provided during that time period other than his response about having

used methamphetamine that was in relation to the individuals that had been identified for narcotics trafficking?

A. No, there were not.

Q. Mr. Fellers had indicated -- well, at some point, Mr. Fellers was advised that the conversation really needed to wrap up; is that a fair assessment?

A. Yes.

Q. And then also at that point there were some steps taken to get him ready to physically leave the room, for example, getting some shoes; is that right?

A. Yes, ma'am, that's correct.

Q. Okay. During the - the time that he was getting his shoes, who accompanied him to do that, do you remember?

A. Both Deputy Bliemeister and I were with Mr. Fellers.

Q. During that time period, did you interrogate about Mr. Fellers about narcotics or drugs?

A. No, ma'am.

Q. Did he make any statements regarding narcotics or drugs during that time period that you recall?

A. Not during that time period.

Q. He was then transported to the jail; is that correct?

A. Yes, ma'am.

Q. And who transported him?

A. Deputy Bliemeister and I.

Q. During that period of transportation, did you ask Mr. Fellers any questions regarding narcotics or narcotics trafficking?

A. No, ma'am.

Q. Did you ask him any questions regarding the individuals that earlier had been identified?

A. No, we did not.

Q. During that time period, did Mr. Fellers make any statements regarding narcotics or narcotics trafficking?

A. No, ma'am.

Q. Did -- during that time period, did Mr. Fellers continue to - to make comments about unrelated things?

A. I don't recall if on the ride from the residence down to the jail if that kind of conversation continued or not. I -- that kind of conversation was going on the entire time we were at the house, but I don't remember specifically when we were in the car if it was or not.

Q. When you got to the jail, what area of the jail did you and Deputy Bliemeister take Mr. Fellers?

A. We initially went to the - to the book-in area.

Q. And after that, was there an interview performed of Mr. Fellers?

A. Yes, ma'am, there was.

Q. Where did that take place?

A. In an interview room located off of the book-in area.

Q. Who was present for that interview?

A. Myself and Deputy Bliemeister.

Q. And during the interview, did anyone else enter or leave?

A. No, they did not.

Q. Was Mr. Fellers advised of his Miranda rights?

A. Yes, he was.

Q. Were you present during that?

A. Yes, I was.

Q. Was there a Miranda warning form that was used?

A. Yes, ma'am.

Q. And did you sign that form?

A. Yes, I did.

Q. In front of you is Exhibit Number 1. Do you see that?

A. Yes, I do.

Q. Have you seen that before?
A. Yes, ma'am.
Q. Is that the Miranda form that was used for Mr. Fellers?
A. Yes, it is.
Q. Where does your signature appear?
A. On the lower left towards the bottom under the witness signature line.
Q. During the time that you talked to Mr. Fellers did he ever request to have an attorney present?
A. No, he did not.
Q. Did he ever refuse to make statements to you?
A. No.
Q. Did you ever promise anything to Mr. Fellers in return for him making a statement to you?
A. No, I didn't.
Q. Did you make any promises, direct or implied, to Mr. Fellers that a confession or admission would result in a benefit or advantage to him?
A. No, I did not.
Q. Did you coerce or attempt to coerce him into making a statement with threats of force, direct or implied?
A. No, ma'am.
Q. And during the interview of Mr. Fellers, was

he asked questions by yourself and Deputy Bliemeister?
A. Yes, he was.
Q. Did he appear to understand those questions?
A. Yes, he did.
Q. Did he provide some answers to some of those questions?
A. Yes, ma'am.
Q. Did they seem to be consistent with the questions that were asked?
A. Yes.
Q. Did Mr. Fellers appear to freely, voluntarily and intelligently waive his privilege against self-incrimination?
A. Yes, he did.
Q. And did Mr. Fellers appear to freely and voluntarily waive his right to have an attorney present during questioning?
A. Yes.
Q. During the interview that took place in the jail, do you recall any questions that you asked him?
A. Yes, I do.
Q. What did you ask him?
A. I asked Mr. Fellers some questions about his use of methamphetamine, questions that related to what method he was using to ingest methamphetamine and

approximate amounts of how much methamphetamine he was using at the time.

Q. And did he provide you with answers to that?

A. Yes, ma'am, he did.

Q. Did -- let me go back to the house for a minute. When you were in the living room and Mr. Fellers was seated, did he have anything to eat or drink?

A. He had a glass or a sports cup of iced tea, I believe.

Q. You said it was iced tea. Do you know there was iced tea?

A. I thought there was some conversation about that at the house. I can't be certain that that's what it was.

Q. During the time that you had contact with Mr. Fellers on that day, did he ever appear to be intoxicated?

A. No, he did not.

Q. Did you ever make any observations regarding what you thought was the use of alcohol?

A. No.

Q. Did you ever smell alcohol on him?

A. No, I did not.

Q. And you said that you had asked Mr. Fellers some questions about his use of methamphetamine and how

he used it. Is that something that you would do on a normal interview of this type?

A. Yes, it is.

Q. During the interview with Mr. Fellers, did he provide information regarding Kathi Kuenning?

A. Yes.

Q. Did he provide information regarding drug use or trafficking with some other individuals?

A. All those matters were discussed, yes.

Q. Did he also make some other statements regarding personal problems again?

A. Yes, he did.

Q. At any time during your contact that day with Mr. Fellers, did he ever refuse to answer questions without an attorney present?

A. No, he did not.

Q. Did he ever invoke his right to silence?

A. No, he did not.

Q. Was he ever -- did he ever request an attorney and have it denied?

A. No.

MS. LIPOVSKY: I don't have any other questions.

THE COURT: Cross?

MR. BRENNAN: Thank you.

CROSS-EXAMINATION

BY MR. BRENNAN:

Q. Detective Garnett, did you generate any investigation reports as a result of your contact with Mr. Fellers?

A. No, sir, I did not.

Q. Did you know Mr. Fellers prior to contacting him on February 24, 2000?

A. Yes, sir, I did.

Q. From a previous personal contact?

A. Yes, sir.

Q. At his home?

A. No, sir.

Q. Where did that previous personal contact occur?

A. Well, it was a business contact, if you will. I mean, I believe it occurred at the -- it was in 1991, I believe, that it occurred at the Harvester Motel, I think.

Q. You weren't on duty or working at the time of that contact?

A. Yes, I was. That's what I mean. It was a per -- it was a business contact.

Q. Oh, okay. So it had to do with police business.

A. Yes, sir.

Q. Is that the only previous contact you'd had with him?

A. Yes, sir, I believe it is.

Q. Was he working at that Harvester at that time?

A. No, sir.

Q. When you contacted him on February 24th, did you have a tape recorder?

A. No, I did not.

Q. Was there one in the vehicle?

A. Not to my knowledge.

Q. Whose vehicle was it?

A. Deputy Bliemeister's.

Q. When you contacted him, the purpose of the contact was to arrest him on the federal warrant?

A. Yes, sir.

Q. And you had that warrant with you at the time?

A. Yes, sir, I did.

Q. And when you knocked on the door and he answered, the first one to speak was Mr. - was Deputy Bliemeister?

A. Yes, sir.

Q. And Deputy Bliemeister, his initial comment was that you were there to discuss with Mr. Fellers his involvement in the use and distribution of

methamphetamine?

A. Words to that effect and - and I don't know the first words he said was, do you remember me or - but those two statements were made almost simultaneously.

Q. Okay. And then Mr. Fellers was told that you had a warrant for his arrest?

A. Mr. -- as we stepped inside, Mr. Fellers was told that the Grand Jury had returned an indictment against him. I don't specifically ever remember at that point whether or not a further explanation was afforded that there was an actual warrant for his arrest or not.

Q. But that you told him - or Bliemeister told him that you were there to arrest him.

A. Yeah. Again, I remember specifically the conversation about the indictment charging him with methamphetamine, and I -- again, I don't know if the words were ever uttered, I'm here to put you under arrest. I can't tell you that they were, sir, no.

Q. You can't say whether they were or whether they weren't.

A. No, I can't.

Q. But you do remember the comment about the indictment being made by Deputy Bliemeister?

A. Yes, sir.

Q. And that indictment comment was made in

connection with certain names by Deputy Bliemeister.

A. That's correct.

Q. Do you remember the names that Deputy Bliemeister said to Mr. Fellers?

A. Some of them, if not all of them.

Q. Tell us the ones that you can remember.

A. Kathi Kuenning, Thomas Geffs, Patrick Sardeson.

Q. Do you remember him saying anything about Mark Farfalla?

A. I don't remember that, but it - Mr. Farfalla was part of that investigation so it's possible that name was mentioned as well.

Q. Do you remember him saying anything about Ernest Lawrence or Leon Thompson?

A. We talked about Ernest Lawrence at the jail, but I don't - I don't remember that name being mentioned at the initial contact.

Q. What about Leon Thompson?

A. I don't remember that name, either, being mentioned.

Q. At the time of the contact with Mr. Fellers he was not free to go, was he?

A. No, sir.

Q. And at the time of the contact with Mr.

Fellers, he was not advised of his right to remain silent, was he?

A. No, sir, he was not.

Q. And he was not advised of his right to have the assistance of an attorney during any conversation with him, was he?

A. No, sir.

Q. You, as a police officer for how many? Twenty-six years?

A. Yes, sir.

Q. -- have received training in how to conduct an arrest?

A. Yes, sir, I have.

Q. And the training is that when an arrest is made, the arrestee is advised of his right to remain silent and to have an attorney present.

A. No, sir.

Q. That's not your training?

A. Not when we're talking about merely arresting someone, no, sir.

Q. Okay. Are you trained to preface the arrest with the comment that you're here to discuss involvement in the use or distribution of methamphetamine in this type of a case?

A. No, sir, not necessarily.

Q. When you were talking with Mr. Fellers in his residence, he sat down and offered you a seat to discuss whatever you wanted to discuss.

A. I -- again, I don't remember that he offered us a seat, but he may - may well have, yes.

Q. And he did take a seat himself and made the statement that he would talk to you about what you wanted to talk about.

A. Yes, sir, there was conversation about that.

Q. And he was, again, told that you were there to discuss his involvement in the use and distribution of methamphetamine.

A. He was - he was told by Deputy Bliemeister that we need to talk to you about this use and the sale of methamphetamine, yes.

Q. And while you were talking to him, you and Deputy Bliemeister were standing a few feet away from him.

A. That's correct.

Q. Were you side by side?

A. We weren't standing exactly side by side, but I'm sure we were in close proximity to one another, yes.

Q. Facing Mr. Fellers.

A. Yes.

Q. And during that conversation, he made

statements to you and Deputy Bliemeister in connection with the names of the people that Deputy Bliemeister said to him when he talked about the federal indictment.

A. No, sir. Deputy Bliemeister said those names at the same time he was explaining about the indictment. That's who brought those names up.

Q. Deputy Bliemeister.

A. Yes.

Q. And Mr. Fellers, in response to that statement by Deputy Bliemeister, talked about using methamphetamine.

A. Yes.

Q. During a period of time in his life when he was associating with those people.

A. He didn't connect the use of the methamphetamine specifically with any one of those people at that time.

Q. He was talking about them generally.

A. He was talking about his use of methamphetamine.

Q. During a particular time in his life.

A. Yes, sir, that's correct.

Q. And it was in connection with personal problems that he had.

A. That's correct, yes, sir.

Q. And then you think that conversation lasted several minutes?

A. I don't -- I didn't pay any attention to when it started and when it ended, but we weren't there a great deal of time, no, sir.

Q. Approximately 15 minutes?

A. I would think that that's somewhere in the ballpark, yes, sir.

Q. Do you remember what time you arrived at the jail?

A. Not speci -- excuse me, not specifically, no, sir.

Q. How about approximately?

A. It had to be, I'm thinking, between 4:30 and 5 p.m.

Q. In -- at the jail did you have a tape recorder?

A. No, sir, we did not.

Q. Did you attempt to get one?

A. No, sir.

Q. In the interview at the jail, could you estimate approximately how long that interview lasted?

A. Oh, to be honest with you, I'd just be guessing if I said.

Q. That's okay with me.

A. I'm going - I'm going to say 30 minutes maybe. Maybe a little bit more, maybe a little bit less. I --

Q. Approximately 30 minutes?

A. I'm going to think somewhere in that area, yes.

Q. And during that interview, Mr. Fellers again made statements to you about the use of methamphetamine at a particular point in time in his life.

A. Yes, sir, he did.

Q. While he was experiencing personal problems.

A. Yes.

Q. And during the interview at the jail, the same names that Deputy Bliemeister mentioned at the home were mentioned by either you or Deputy Bliemeister.

A. Yes, sir. At the jail, he was interviewed about - specifically about those people and his relationship and involvement with those people, yes.

Q. Okay. And his statements to you about those people was also in connection with that time in his life when he was using methamphetamine.

MR. LIPOVSKY: I'm going to object. That's asked and answered.

THE COURT: (Indiscernible)

A. I'm sorry. Would you state that again, please, sir.

Q. (By Mr. Brennan) The statements that he made at the jail in connection with those people whose names were mentioned --

A. Um-hmm.

Q. -- was also about the personal problems that he was having while he was using methamphetamine.

A. Again, he was relating the use of the methamphetamine to the personal problems. We interviewed him - or attempted to interview him in depth about those particular individuals. If you're asking me was this over the same time period, I would say that yes, it was, at least in part of it.

Q. Okay. After the interview was over, did you tell Mr. Fellers that you would see what you could do to help him?

A. We had a discussion as the interview was ending, and - or as the interview was over, when we ended the interview. We talked about a number of things, and I believe one of the things that we talked about after the interview was over was that we thought Mr. Fellers had information that would be of use to us that had not been provided by Mr. Fellers.

Q. That was a statement you made to him?

A. I'm sure I did, yes.

Q. And that you wanted to work with him or do

something to help him?

A. No, sir. That statement - that part, that statement was not made because the interview -- Mr. Fellers was told as the interview was over that we felt he was withholding information, that he had not been truthful with us and that we had information very contrary to what he was telling us.

Q. Was he searched by either you or Deputy Bliemeister?

A. At what time, sir?

Q. Either at the residence or at the jail.

A. He was -- he would have been searched by us prior to leaving the residence and being transported to the jail. And he would have been searched once again by the jail staff personnel, yes.

Q. When you searched him at the residence, did you seize any evidence from him?

A. No sir.

Q. Do you know whether the jail seized any evidence from him?

A. Not to my knowledge.

MR. BRENNAN: That's all.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MS. LIPOVSKY:

Q. At some point after the interview did someone mention the possibility of a proffer interview to Mr. Fellers?

A. Yes, we did.

Q. Was that brought up before or after the interview?

A. That would have been brought up at the end of the interview.

Q. Was he continued to be interviewed after that?

A. No.

Q. Do you remember the conversation at the home when Mr. Fellers responded about that was when I was having personal problems - using meth and I was having personal problems, did Mr. Fellers ever identify specifically people that he had obtained methamphetamine from?

A. No, he did not.

Q. During that - his statements at his home, did he ever identify who he had sold methamphetamine to?

A. No, ma'am.

Q. Did he ever make any statements as to who was involved in his use of methamphetamine while he was at the home?

A. No.

Q. While he was at the home and you were - he was

making comments at the home, did he ever specify any information regarding the people whose names had been identified by Deputy Bliemeister?

A. No, he did not.

Q. And while he was at the home, was he specifically asked questions about those individuals?

A. No.

MS. LIPOVSKY: I don't have any other questions.

THE COURT: You may step down.

MS. LIPOVSKY: Your Honor, may this witness be excused?

MR. BRENNAN: No objection.

THE COURT: All right. Yes, you're excused.

MS. LIPOVSKY: I have no other witnesses.

THE COURT: Evidence for the defense?

MR. BRENNAN: I do not intend to present evidence.

THE COURT: All right. I'll hear your arguments. First, Mr. Brennan.

MR. BRENNAN: It's clear from the evidence that Mr. Fellers was contacted for the purpose of being arrested, contacted by two law enforcement officers. And the first thing that they said to him was, we're here to discuss your involvement in the use and distribution of

methamphetamine. In fact, on a previous occasion, Deputy Bliemeister had been there on a - what he couched as a knock-and-talk contact. He said the same thing that time: I'm here to discuss your use and involvement - or your involvement in the use and distribution of methamphetamine - or in activity involving methamphetamine.

It's clear that that was the purpose on the previous occasion to get Mr. Fellers to make statements and the purpose of making those comments on February 24, 2000. There really isn't any other reason to say that. They're not trained to say that, that Deputy Bliemeister's practice is to say that when he is arresting someone who has been indicted by a federal grand jury. Both officers testified that they told Mr. Fellers - or that Deputy Bliemeister told Mr. Fellers that he had been indicted by a federal grand jury. Sergeant Garnett wasn't able to specifically recall the names but Deputy Bliemeister seemed to be able to do that. And he said that the names that he told Mr. Fellers that he wanted to discuss with him were Patrick Sardeson, Thomas Geffs, Kathi Kuenning and Mark Farfalla. And he said that in the same breath as the comment that he made about why he was there. We're here to discuss your involvement in the use and distribution of

methamphetamine. We have a federal warrant for your arrest and you've been indicted by a federal grand jury in connection with these people and their activity concerning methamphetamine. If that is not a statement that is designed to elicit a response, then I don't know what one is.

Now, Deputy Bliemeister said that wasn't the reason that he made that statement, but it's clear that any reasonable person would recognize that that statement would probably, most likely, elicit a response from the person that the statement is being made to. And that's what it did. Mr. Fellers sat down on the couch and offered seats to these officers to discuss whatever it was they wanted to talk to him about. And then he began talking about his use of methamphetamine in connection with the statement made to him concerning the people named, Kathi Kuenning, Mark Farfalla, Patrick Sardeson and Thomas Geffs. He may not have repeated their names to those deputies - or to the deputy and the sergeant when he was talking to them about his use of methamphetamine, but it's clear in the entire context of the conversation that that's what he was referring to. They gave him names. He refers to a time in his life in responding to those names about when he's having personal problems with his marriage and his business and that

that's when he was using methamphetamine.

At that point, he has already acknowledged to these law enforcement officers that he knows what they're talking about, he knows who these people are and he knows that it's in connection with their use of methamphetamine and their providing it to him for his own use. And to then later on take him to the jail and advise him of his right to remain silent and have an attorney present and then go through within more detail doesn't cure the fact that they have elicited incriminating statements from him at a time when he's not free to go. He's clearly in custody; no one can make a credible argument that he was not in custody at the time that he was being interviewed at the home while he was sitting and they were standing over him.

Then later take him to jail and say okay, now we're going to advise you of your rights. We're going to go through this in greater detail does not cure the illegality of the information obtained. And the -- the case I cited to you in my brief -- I think it's Brown v. Illinois -- says that the mere giving of Miranda warnings and a (indiscernible) waiver obtained thereby doesn't insulate a subsequent interrogation from the exclusionary rule where the information obtained during that subsequent interrogation was merely expanding on or

elaborating on the information that was obtained illegally. And it's clear that he was in custody and unadvised and therefore his statements made at the house shouldn't be admissible. And the mere giving of Miranda warnings at the jail doesn't cure the admissibility or the effect on the admissibility of those statements later on at the jail simply because they involve more detail and may involve a couple of more names.

So we would respectfully submit to this Court that whether Deputy Bliemeister admits it or not, it was clear that - it was clearly unnecessary to tell him in a preface to the fact that they were going to arrest him, that they were also there to discuss this with him and that it's clear that the effect of that was to induce him to make incriminating statements. The law doesn't permit you to obtain incriminating statements from someone without advising them of their rights while they're in custody and then later on advising them of their rights and go through it again even if it happens to be in a little bit more detail.

And so for those reasons, we would respectfully submit that the jailhouse interview is equally inadmissible and I don't think there can be any credible argument that the statements made at the - at the home were not made in custody and in response to

questions or a statement designed to elicit a response. And we would ask the Court to sustain the motion to suppress the statements and not permit them to be used at the trial in this case.

THE COURT: Miss Lipovsky?

MS. LIPOVSKY: Thank you, Your Honor.

First off, I don't believe either witness testified that Mr. Fellers was told we have a federal warrant for your arrest. I don't remember either witness --

THE COURT: Bliemeister did.

MS. LIPOVSKY: Bliemeister did? That he said that he had a federal warrant that he told Mr. Fellers that? I believe it was --

THE COURT: In response to my question, he said that.

MS. LIPOVSKY: My recollection of it was that Deputy Bliemeister said they had a federal warrant, but I don't recall the specific words used by him. My understanding and my impression of what he said is that we had - they had a federal warrant for his arrest, not that he was told. Deputy Bliemeister testified several times what he said, and he said that, we're here - we need to talk about your involvement with methamphetamine. You've been indicted by the Grand Jury regarding your

association with Kathi Kuenning, a couple of other people, Patrick Sardeson, Thomas Geffs, and I believe Mark Farfalla.

With the understanding -- that's my recollection. But the testimony is I think that there is a question as to whether or not a reasonable person would have believed that they were in custody at that point in time. Later Mr. Fellers was arrested but originally, my understanding of the testimony and Deputy Bliemeister's statement was that, they didn't tell him they had the arrest warrant, they didn't tell him he was arrested at that time. But they did tell him that he - that an indictment had been returned.

And of course, that puts it in a little position than most of the cases that talk about an individual that yes, they're going to arrest him, but they don't tell him at the time that they go to talk to him. So the question is if a reasonable person would have believed they were in custody at the time, independent of what the officers believed, they would have allowed him to leave, to come and go or not. And so I think that there is an argument that at the time they made the initial contact he was not custody.

But, even if the Court wants to find that he was in custody because there was a warrant that was in

existence for Mr. Fellers and he had been told that he had already been indicted, in order to trigger Miranda, you have to interrogate Mr. -- you have to interrogate the person.

It is the Government's position that in this particular case the officers were not interrogating Mr. Fellers. They advised him that they would like to talk to him - or that they needed to talk to him about methamphetamine, that there was an indictment and it was regarding these individuals. And after this - making the comment that the indictment's been returned about your trafficking activities or your narcotics activities with Geffs, Kuenning, Sardeson and Farfalla, Mr. Fellers says, oh, you know, that period of time was, you know, I mean, I was using methamphetamine and had all these problems. And he starts talking about all of his personal problems. He's not questioned after that. He isn't asked, well, what were you doing with Kathi Kuenning, what was going on specifically with Pat Sardeson. Mr. Fellers, who's sitting casually in his home, talking, drinking from a mug of iced tea, is talking about his personal problems. And he's not even responding or giving any information that's in relation to drug narcotic trafficking. The only thing he said was that he had used methamphetamine during a period of time when he was having personal

problems. And they he continued to expound upon those personal problems.

The officers let him talk for five to ten minutes and finally said, okay, that's it, we've got to move on, we're going to arrest you, we need to take you down to the station. And that's when the search for the shoes and the other things happened.

After they got to the station, the officers and Mr. Fellers went into the other room. Mr. Fellers had indicated he was willing to talk. They Mirandized him. He willingly waived all of his Miranda rights and then they began to ask him specific questions and he began to give them information.

In Alstad v. Oregon, which is at 105 Supreme Court 1285, is a post Brown case. It's in 1985. And in that case, the Court is very clear. It says that when a suspect who has once responded to unwarranted and uncoercive questioning, he is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings. And that's what you have here. There was no interrogation of Mr. Fellers at his home. The only halfway incriminating statement he made was that he had used methamphetamine during a period of time when he was having personal problems. That was not coercive questioning. In fact, in the Government's

position, it wasn't questioning at all. It was merely a response Mr. Fellers had to the statement that he'd been indicted regarding his activities with these people.

Once he was taken into the station, the officers read him his rights. That's recorded in Exhibit 1. He willingly, knowingly, intelligently and voluntarily waived all of those rights. And all the statements he made after that are admissible in this court. (Coughing) Excuse me. That is when he made statements regarding those individuals, statements that he had never made before. He provided information that he had never provided before. He went into details that he'd never provided before. What he said at the station was not a repeat of what he had said in his home. As I said before, and as the officers testified to several time, he didn't say anything that was incriminating about methamphetamine or those individuals other than a simple statement, oh, that's when I was using methamphetamine. I had a lot of problems then, and he starts talking about all of his problems.

So it's the Government's position that all of the statements that Mr. Fellers made are admissible, and in particular the statements that were made after he waived his Miranda rights and was actually in custody and interrogated by the officers. All of those statements

are admissible and the defendant's motion should be denied.

THE COURT: Mr. Brennan, anything else?

MR. BRENNAN: Just briefly, Your Honor. It is my recollection, and I think it's clear, that Deputy Bliemeister did tell and testified before this Court that he told Mr. Fellers that they were there to arrest him and had a federal warrant for his arrest. His testimony was he made the comment about what they were there to discuss, that he then made the comment that there was a federal arrest warrant and that they were there to arrest him and then he made the comment about the indictment and naming the people whose names were brought up in connection with the indictment.

If that's not a clear signal to Mr. Fellers that he is under arrest and not free to go, I don't know what is. There should really be no question about whether he was in custody at the time of the interview in the living room of his home. And unfortunately, we don't have a tape recording of that interview, nor do we have a tape recording of the interview at the jail. That's not Mr. Fellers' fault, but it just seems a little unreasonable to assume that that interview at the home was, with two officers standing there saying nothing, and Mr. Fellers just rambling on for 15 minutes about the

personal problems in his life when he was associating with these people while he was using methamphetamine. It is not a reasonable argument to say that they just stood there and listened and didn't say anything to him during that conversation.

It's clear that the initial comment was if not designed to elicit a response, which I think it was, was clearly one that any reasonable person would respond to if the statement was made, and it's clear that it wasn't him just volunteering information but, rather, responding to what was said to him by the arresting officers.

And then later at the jail again, we don't have the benefit of a tape recording, but the law recognizes the psychological effect that it has on a suspect in custody when he's already given information and then later being asked, do you want to now assert your right to remain silent and have an attorney and the futility that everyone would recognize in now making that assertion after the cat's already out of the bag and the person has already given the incriminating information. And that's precisely why the law is - the exclusionary rule does not permit those subsequent statements to be admitted in court if they're merely following up on previously illegally obtained admissions. And with those comments, we would again ask the Court to sustain the

motion.

THE COURT: Well, the principal issues before the Court in regard to the motion to suppress are, first of all, whether or not the defendant was in custody at the time of the statements made in his home at the time of his visit by Detective Garnett and Deputy Bliemeister.

The factors that I have to consider in determining whether or not the defendant was in custody at that time are stated in United States v. Griffin, 922 F 2nd 1343, which is an Eighth Circuit case in 1990. The first one is whether the suspect was informed at the time of questioning that the questioning was voluntary, that the subject - suspect was free to leave or request the officers to do so or that the suspect was not considered under arrest. Obviously, that's not applicable here.

Second, whether the suspect possessed unrestrained freedom of movement during questioning and Deputy Bliemeister said that he was not free to move around. And that was confirmed by Detective Garnett.

Whether the suspected -- excuse me, whether the suspect initiated contact with authorities. He did not. Or voluntarily acquiesced to official requests to respond to questions. The request was an official request to talk. It wasn't to respond to questions explicitly. But implicitly, it was.

Whether strong arm tactics or deceptive stratagems were employed during the questioning, I do not see that there was any strong arm tactic involved at all; however, the use of detective stratagems is another matter. There were no deceptions as such, but when the officers arrived, Detective Bliemeister said that the purpose of their visit was to discuss with the defendant his role in methamphetamine use and distribution. That was not a true statement. Their purpose was to arrest him. In addition, Detective Garnett stated we need to talk with you about your involvement in methamphetamine use or distribution. Again, while that's not altogether untrue, it does not reflect truthfully the purpose of their visit.

The next factor is whether the atmosphere of the questioning was police dominated, and I find that it was police dominated. They had, at that time, arrested him. I find specifically that Deputy Bliemeister did advise him that either he was arrested or they had a warrant for his arrest in the course of his initial contact and comment to the defendant.

The last factor is whether the suspect was placed under arrest at the termination of the questioning. Obviously, he was arrested before that.

One other thing: With regard to the arrest,

there was a notable lack of testimony that at the conclusion of their conversation the officers arrested the defendant. Both of them testified that the comment that was made was simply we need to go now, John, and take you to the jail. If they had not previously advised him that he was under arrest or if it were not clear that he was under arrest, then they would have had to have explained that statement and to explicitly arrest him at that time. There was no testimony that they did.

I therefore find that he was under arrest at the time of all of the statements made. He was definitely in custody under the considerations of Griffin.

The next question is whether or not he was interrogated. The applicable test is from Rhode Island v. Innis (ph). And, as stated by Mr. Brennan, it is whether or not the comment made was designed to elicit a response. I find that it was. First of all, it is telling, I think, that the first statement made was, we need to talk with you - or we want to talk with you about your involvement in methamphetamine distribution or use. I don't know how that could be anything except designed to elicit a response. It certainly was worded in a way that one would expect a response. Deputy Bliemeister said that he was not surprised that it got a

response.

In addition, it was, again, as Mr. Brennan mentioned, unnecessary for him to say what the indictment was all about specifically mentioning individuals which incident - who incidently are not mentioned in the indictment. I cannot believe that that mentioning of individuals was stated for any purpose other than to get a response in relation to those individuals, and I so find.

The next question is since he was not Mirandized and since he was interrogated while he was in custody, how much needs to be suppressed. The defendant states that everything involved in the - in the comments made by the defendant should be suppressed, even those subjects which were repeated at the jail. I must decide whether or not the subjects that were first broached at the home and later discussed in detail at the jail -- I guess the issue is whether or not there was something in between to attenuate the primary taint, as the clause goes. There was no evidence in that regard, directly. There was evidence that they took him immediately to the jail; he was booked in. I think I can take judicial notice of the fact that wherever this address is in Lincoln, Nebraska, it's probably no more than 20 minutes away from the jail. So I think that it's fair to

conclude that this conversation took place approximately a half hour after the officers and the defendant left his home.

He was Mirandized at this time and I also find that he voluntarily agreed to talk with the officers at that time.

Obviously, the subjects that were mentioned for the first time at the jail and the defendant's comments regarding those subjects need not be suppressed. My notes indicate that the individuals Ernie Lawrence, Valerie Green, Leon Thompson, Shelly Farfalla were first mentioned at the jail. Also the subject of the defendant's involvement in distribution of methamphetamine was first mentioned at the jail. And also the subject of the defendant fronting money for the purchase of methamphetamine was mentioned first at the jail.

With respect to the individuals that were mentioned and the fact that by answering, the defendant acknowledged that he knew those individuals and by stating that at that period of time, he was having personal problems and was using meth, thereby incriminating him and connecting the meth with the individuals, that must be suppressed. And I shall recommend that all of the comments made by the defendant

at the home be suppressed as well as any comments regarding those specific individuals elicited at the time of the interview in the jail be suppressed. That would be the three individuals: Kathi Kuenning, Pat Sardeson and Thomas Geffs, otherwise known as Slick.

There's no information by which I can find that the primary taint of the initial interrogation by the officers was removed by any time or any other activity between the time of the initial statement - interrogation and statement and the time of the subsequent interview in the jail.

Therefore, it will be recommended - is recommended to the trial judge pursuant to 28 USC 636b(1)(b) that the motion to suppress be granted in these respects and denied in all other respects. I shall order that at the time the transcript of this hearing is filed that will be deemed the filing of the report and recommendation. I will direct the clerk to notify counsel of that filing and at that time we'll commence the ten-day limitation for filing objections. Either side or both sides may file objections. After they have been responded to, the matter will go before the trial judge for a decision.

Is there anything else that we should address regarding this case today?

MS. LIPOVSKY: Is this -- no.

THE COURT: All right.

MR. BRENNAN: I'm sorry. Did you mention the name Mark Farfalla in - you said three names, and there were actually four names that were mentioned by Bliemeister at the home and the fourth name was Mark Farfalla.

THE COURT: Let me check my notes on that. I did not write that - that name down as I was taking notes. If, in the transcript, that name is mentioned as having been mentioned at the home for the first time, then my recommendation would include that name as one of the subjects to be suppressed. All right.

If there's nothing else, we'll be in recess.

MR. BRENNAN: Thank you.

(end of proceedings)

* * * * * *

TRANSCRIBER'S CERTIFICATE

I hereby certify that the previous pages reflect truly, accurately and completely the recording of this proceeding as transcribed by me to the best of my ability.

In testimony whereof, I have hereunto set my hand this 29th day of April, 2000.

Karen Mason

Transcriber - Karen Mason

APPENDIX "F"

Amendment VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.